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2963

No. 15038

United States
Court of Appeals
for the Ninth Circuit

FRANK M. CHICHESTER, Trustee in Bank-
ruptcy of Estate of S. A. Willen Company, a
corporation, bankrupt, Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGE-
LES, Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAY 24 1956

PAUL P. O'BRIEN, CLERK



No. 15038

United States
Court of Appeals
for the Ninth Circuit

FRANK M. CHICHESTER, Trustee in Bankruptcy of Estate of S. A. Willen Company, a corporation, bankrupt, Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.



In the District Court of the United States, South-
ern District of California, Central Division
Division

In Bankruptcy No. 62222-BH

In the Matter of S. A. WILLEN COMPANY, a
corporation, Bankrupt.

PETITION FOR RECLAMATION

To the Honorable Ben Harrison, Judge of the
United States District Court, for the Southern
District of California:

The petition of Union Bank & Trust Co. of Los
Angeles, secured creditor of the estate of the above
named debtor, respectfully represents:

(1) A portion of the said debtor's estate consists
of the sum of Fifteen Thousand, Nine Hundred and
ninety-one and 68/100 Dollars (\$15,991.68) which
amount represents a portion of moneys received by
the Trustee from the sale of certain machinery and
equipment of the said bankrupt situated at Los An-
geles, described in the inventory on file herein and
being more particularly described in a certain mort-
gage of chattels dated February 4, 1953 and recorded
in the office of the County Recorder of Los Angeles
County, California, on the 20th day of February,
1953, to secure the payment of a certain note exe-
cuted by the above named debtor [2] payable to
your petitioner under the terms and conditions of
the said mortgage.

2. On November 3, 1954, Frank M. Chichester, Trustee of the estate of the above named bankrupt, filed a petition for the sale of personal property free and clear of liens whereby he requested that an order be made requiring your petitioner, Union Bank & Trust Co. of Los Angeles, as mortgagee, to show cause before this Court why an order should not be made and entered, directing that all of said machinery and equipment described in his said petition and covered by the mortgage hereinbefore referred to, be sold by him as Trustee of the said bankrupt in the manner prescribed by the laws relating to bankruptcy, free of and from the lien of the said mortgage and that the proceeds arising out of and from the sale of the said property be held by him subject to the lien of the said mortgage to all intents and purposes as though the said property had not been sold, subject to the final order, judgment and decree of this Court, or the final order, judgment and decree of a court of competent jurisdiction, as to the validity of the said mortgage.

(3) Pursuant to a stipulation entered into by and between Gabriel Hoffenberg, Attorney for Frank M. Chichester, Trustee of the above named debtor, and I. B. Kornblum, Attorney for Union Bank & Trust Co. of Los Angeles, petitioner herein, reference to which is hereby made and incorporated as if fully set forth herein, the Honorable David B. Head, Referee in Bankruptcy, on November 16, 1954, ordered that the said Frank M. Chichester, as Trustee of the above named debtor, be permitted, authorized and directed to sell and dispose of the said machin-

ery and equipment described in said inventory and chattel mortgage, free of and from the lien of the said chattel mortgage hereinabove referred to, subject to the further order, however, that the said Trustee retain the proceeds of and from the sale of the said machinery and equipment [3] which proceeds were to be held by him subject to the lien of the said mortgage to all intents and purposes as though the said property had not been sold, and to the final order, judgment and decree of this Court or the final order, judgment and decree of a court of competent jurisdiction as to the validity of the said chattel mortgage. The said stipulation further provided that nothing therein should be construed as an admission by your petitioner, the said Union Bank & Trust Co. of Los Angeles, of any of the allegations of the petition for sale of personal property free and clear of liens theretofore filed by the said Frank M. Chichester as Trustee for the above named debtor and that your petitioner, Union Bank & Trust Co. of Los Angeles shall be deemed to have denied all of the allegations therein contained excepting the allegations reciting the execution and delivery and recordation of the note and mortgage referred to in said petition for sale and the balance due thereon at that time of \$15,991.68. Said stipulation further provided for an amendment of one of the allegations of the said Trustee's petition to the end that the date of knowledge by the creditors of the existence of said note and mortgage alleged by the said Trustee as being February 20, 1954 was stipulated as being February 20, 1953.

(4) Your petitioner is informed and believes and therefore alleges that the Trustee did, pursuant to said petition and order, sell the said machinery and equipment and is now in possession of the moneys obtained therefrom, part of which includes the aforesaid \$15,991.68. Your petitioner has, since January 5, 1955, requested the said Trustee to either pay to it the balance due on the note secured by the said chattel mortgage out of the moneys held by him from the sale of the said machinery and equipment pursuant to said stipulation and order or to forthwith commence such proceedings as he may deem necessary to adjudicate the matter. [4] Responding to a request dated January 5, 1955, said Trustee did, on January 6, 1955, advise that he had instructed his counsel, Gabriel Hoffenberg, to proceed without delay in taking further proceedings for the purpose of determining the validity of said chattel mortgage held by your petitioner, Union Bank & Trust Co. of Los Angeles. Since said January 6, 1955, your petitioner has had no advice as to any such proceedings and believes that no further purpose will be served by any further delay in adjudicating the said matter. That certain allegations in the said petition with reference to the validity of the said note and mortgage, the legality and freedom from inferences of fraud are without merit and were made for the purpose of casting a reflection upon your petitioner's good faith in this transaction and should be determined forthwith.

(5) That there is now due, owing and unpaid on the obligation executed by the debtor, secured by the

aforesaid mortgage of chattels, the sum of \$15,-991.68 together with an additional amount of accrued interest from the date at which time the said amount was due for payment in accordance with the terms and conditions of the aforesaid note.

(6) That your petitioner has been compelled to engage I. B. Kornblum as its counsel in this matter and is obligated to pay him a reasonable fee amounting to \$350 for his services. That by reason of the circumstances hereinbefore related, this honorable Court should order the Trustee to pay said fees.

Wherefore, your petitioner prays that an order be made establishing the validity of the said note and chattel mortgage and that the Trustee be ordered to forthwith pay to your petitioner the sum of \$15,-991.68 together with such additional sum as shall have accrued thereon for interest under the terms and conditions of the said note and mortgage, together with the sum of \$350.00 counsel fees payable to I. B. Kornblum for his services [5] rendered herein and such other and further relief as to the Court may seem meet and equitable in the premises.

UNION BANK & TRUST CO. OF
LOS ANGELES

/s/ By H. N. HERZIKOFF,
Vice President

/s/ I. B. KORNBLUM,
Attorney for Petitioner

Duly verified. [6]

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE WHY PETITION
FOR RECLAMATION OF UNION BANK &
TRUST CO. OF LOS ANGELES SHOULD
NOT BE GRANTED

Upon the filing and reading of the Petition of Union Bank & Trust Co. of Los Angeles, a secured creditor of the estate of the above named debtor and good cause appearing therefor,

It Is Hereby Ordered that Frank M. Chichester, Trustee of the estate of the above-named bankrupt, show cause before me in room 343, Federal Building, United States Post Office and Court House, 312 North Spring Street, Los Angeles, California on the 2d day of March, 1955, at the hour of 10 a.m., in the forenoon of said day or as soon thereafter as counsel can be heard,

(a) Why an order should not be made and entered herein declaring that the note and chattel mortgage held by the said Union Bank & Trust Co. of Los Angeles is a valid note and chattel mortgage. [7]

(b) Why the sum of Fifteen Thousand, Nine Hundred and ninety-one and 68/100 dollars (\$15,-991.68) together with such additional sum as shall have accrued thereon for interest under the terms and conditions of said note and mortgage should not forthwith be paid by said Trustee to said petitioner, Union Bank & Trust Co. of Los Angeles.

(c) Why the sum of \$350.00 should not be paid to

I. B. Kornblum by said Frank M. Chichester, Trustee of the above entitled debtor, as counsel fees for his services rendered herein.

It Is Further Ordered that service of a copy of this Order, together with a copy of the Petition upon which it is based, by mail, on or before February 19, 1955 to the said Frank M. Chichester, Trustee, shall be deemed good and sufficient service hereof.

Dated: February 15, 1955.

/s/ DAVID B. HEAD,

Referee in Bankruptcy

[8]

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR RECLAMATION

The answer of Frank M. Chichester, trustee of the estate of the above named bankrupt, appearing herein as respondent to the Petition for Reclamation, verified on behalf of Union Bank & Trust Co. of Los Angeles on the 11th day of February, 1955, and filed on February 15, 1955, respectfully states:

1. Respondent admits the allegations contained in paragraphs 1, 2 and 3 of the said petition.
2. In answer to paragraph 4 of the said petition,

respondent admits, denies and alleges as follows, to wit:

(a) Admits that respondent, as such trustee, did, pursuant to order of the Referee herein, sell the machinery and equipment referred to in the said petition and that, as such trustee, he now is in possession of the moneys obtained from such sale; admits that the said moneys include the sum of \$15,991.68 shown in the inventory on file herein as being a balance due on a [9] promissory note executed by the above named bankrupt in the original amount of \$27,125.04 payable to Union Bank & Trust Co. of Los Angeles.

(b) Admits that on or about January 5, 1955, the attorney for the said Union Bank & Trust Co. requested respondent, as such trustee, pay to the said bank the said balance out of the moneys held by respondent, as aforesaid, or to commence proceedings to have the matter adjudicated, and that this respondent thereupon advised the said attorney that he had discussed the matter with his own counsel, and that it was respondent's understanding that his counsel would proceed without delay.

(c) Admits that respondent, upon the advice of his counsel, has not heretofore commenced any such proceedings.

(d) Denies that any allegation whatever contained in respondent's petition heretofore filed herein with reference to the said note (or the chattel mortgage claimed by said bank to secure payment thereof) is without merit, and denies that any of such allega-

tions was made for the purpose of casting any reflection upon the good faith of the said bank, whether as alleged in the said paragraph 4, or otherwise.

(e) Admits that the question of the validity or invalidity of the chattel mortgage referred to in the said petition should now be determined herein as promptly as possible.

(f) Alleges that the Referee herein on September 15, 1954, made his order authorizing respondent, as such trustee, to employ the services of T. M. Mulherin, Certified Public Accountant, to conduct an investigation and examination of the records of the said bankrupt; that on January 13, 1955, the said Referee made his further order authorizing respondent to extend the employment of the said accountant to continue such investigation and examination; that the said accountant submitted his written report of such investigation and examination under date [10] of February 9, 1955, and that the said report, setting up various schedules and analyses of accounts of the said bankrupt, and making reference to the chattel mortgage referred to in the said petition, was delivered to respondent's counsel on February 22, 1955; that upon advice of his said counsel, respondent withheld the commencement of any proceedings herein to have determined the matter of the validity or invalidity of the said chattel mortgage until such time as his counsel could complete a study and analysis of the said report; that such study and analysis now have been completed; that by reason

thereof respondent now is prepared to have such matter determined.

3. Respondent has no information or belief upon the subjects sufficient to enable him to answer the allegations contained in paragraphs 5 and 6 of the said petition, and placing his denials on that ground, denies each and every allegation contained in the said paragraphs and each thereof.

Further answering the said petition and by way of setting forth his affirmative defense thereto, together with his denial that petitioner is entitled to the status of a secured creditor of the estate of the said bankrupt, this respondent respectfully represents:

1. That under date of February 4, 1953, the above named bankrupt executed its promissory note payable to Union Bank & Trust Co. of Los Angeles in the principal sum of \$27,125.04; that under the same date, the said bankrupt executed a chattel mortgage purporting to secure payment of the said note, such mortgage having been recorded February 20, 1953, in the office of the County Recorder of the County of Los Angeles, State of California, as Document No. 3501 in Book 41034, Page 34, Official Records of said Los Angeles County; that a copy of the said chattel mortgage is attached hereto, marked Exhibit "A" and made a part [11] hereof.

2. Respondent is informed and verily believes, and therefore alleges (a) that by the terms of the

said note, its principal, together with interest at the rate of $4\frac{1}{4}\%$ per annum, was payable in twenty-four monthly installments of \$1,130.21 each, beginning March 20, 1953.

Respondent is further informed and verily believes, and therefore alleges, (a) that as at February 23, 1954, payments made by the bankrupt on the said note had reduced its principal amount to \$9,016.68, (b) that on or about the said February 23, 1954, the said bank granted and made a new and additional loan to the bankrupt in the amount of \$10,425.00, the amount of \$10,000.00 thereof representing principal and the amount of \$425.00 thereof representing prepaid interest and that such loan was payable in monthly installments of \$868.75 each, (c) that the chattel mortgage hereinbefore referred to purports to secure the aforementioned loan of \$10,425.00, as well as any unpaid balance of original loan of \$27,125.04, and (d) that the said additional loan was made without the knowledge of the creditors of the bankrupt, or any thereof.

3. That the said bankrupt represents in its Debtor's Petition on file herein (Schedule A2, Page 3, the balance of \$15,990.00 (approximately) due or claimed under the said mortgage to be a debt contracted on or about February, 1953, for loan.

4. Respondent is further informed and verily believes, and therefore alleges that the said bank now is the holder of each of the said two notes.

5. Respondent is further informed and verily believes, and therefore alleges, (a) that on the date of

the execution of the said mortgage, to wit, February 4, 1953, the said bankrupt was insolvent and that its property at a fair valuation thereof [12] was insufficient to pay all of its debts in full, which fact the said Union Bank and Trust Company of Los Angeles, as the named mortgagee knew, or had reasonable cause to believe, and (b) that on the date of the granting and making by the said bank to the bankrupt of the aforementioned new and additional loan of \$10,425.00, to wit, on or about February 27, 1954, the bankrupt was insolvent and that its property at a fair valuation thereof was insufficient to pay all of its debts in full, which fact the said bank knew, or had reasonable cause to believe.

6. Respondent is further informed and verily believes, and therefore alleges, (a) that each of the said notes, purported to be secured by the said chattel mortgage, was endorsed by Joseph Speegleman, as guarantor, and that each thereof now bears his endorsement, and (b) [that the said Joseph Speegleman is the father-in-law of Martin G. Kaplan, one of the partners of the firm of Los Angeles Cotton Company, one of the creditors of the estate of the said bankrupt.]*

* Stricken 3/16/55.

7. That on the date of the execution of the said original note and the said chattel mortgage, to wit, February 4, 1953, names of creditors of the said bankrupt, together with the amount owing to each of them, according to the bankrupt's books and records, were as follows:

Creditors	Amount Owing
Ace Paper Co.....	\$ 1,941.27
Crest Pacific Co.....	75.00
E. B. Dixon.....	8,695.02
Herbert Heyman	289.12
Los Angeles Cotton Co.....	29,131.92
L. A. Stamp & Stationery Co.....	8.34
Mudrick Machine Works.....	510.89
Newco Fibre Co.....	41,360.39
Portco Corp.	179.61
Shell Oil Co.....	101.36
Steller & Skoog Hardware.....	63.68
Sugarman Bag & Burlap Co.....	811.89
Van Waters & Rogers, Inc.....	19,582.58
Walley & Davis.....	606.07
	<hr/>
	\$103,357.14
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8. That on the date of recordation of said chattel mortgage, to wit, February 20, 1953, names of creditors of the said bankrupt, together with the amount owing to each of them, according to the said books and records, were as follows:

Creditors	Amount Owing
Ace Paper Co.....	\$ 1,461.05
Crest Pacific Co.....	100.00
E. B. Dixon	9,428.82
Herbert Heyman	124.12
Los Angeles Cotton Co.....	27,580.55
L. A. Stamp & Stationery Co.....	8.34
Mudrick Machine Works.....	526.64

Creditors (Cont.)	Amount Owing
Newco Fibre Co.....	42,760.80
Portco Corp.	167.84
Steller & Skoog Hardware.....	72.97
Sugarman Bag & Burlap Co.....	811.89
Van Waters & Rogers, Inc.....	20,183.73
Walley & Davis.....	606.07
	<hr/>
	\$103,832.82
	<hr/> <hr/>

9. Respondent is further informed and verily believes, and therefore alleges, that the creditors of the said bankrupt hereinabove named, as at the date of of the execution of the said mortgage, to wit, February 4, 1953, had no knowledge of the existence thereof, and that they had no such knowledge until [14] the date of recordation thereof, to wit, February 20, 1953.

10. That on the date of the filing of the Petition for Bankruptcy herein, to wit, July 29, 1954, the names of creditors of the said bankrupt, who were such creditors at the date of said execution and at the date of the said recordation, together with the amount owing to each of them, according to the schedule on file in these bankruptcy proceedings, were as follows:

Creditors	Amount Owing
Ace Paper Co.....	\$ 1,400.91
Crest Pacific Co.....	125.00
E. B. Dixon.....	2,267.61
Herbert Heyman	597.50

Creditors (Cont.)	Amount Owing
Los Angeles Cotton Co.....	10,645.20
L. A. Stamp & Stationery Co.....	55.52
Mudrick Machine Works.....	1,211.69
Newco Fibre Co.....	45,847.60
Portco Corp.	525.76
Steller & Skoog Hardware.....	208.77
Sugarman Bag & Burlap Co.....	188.04
Van Waters & Rogers, Inc.....	8,895.41
Walley & Davis.....	25.00

That each of the above named creditors still and now is a creditor of the said bankrupt estate, and that each of them has a claim against the said estate provable in bankruptcy; that none of them became a creditor subsequent to the date of recordation of the said chattel mortgage. [15]

That during the interval between date of execution of the said mortgage (February 4, 1953) and the date of recordation thereof (February 20, 1953) the rights of numerous creditors were affected in this: they extended additional credit, having no knowledge of the mortgage, and as a result thereof the amounts of their respective claims, now provable in bankruptcy, were substantially increased, all by reason of the withholding of the mortgage from record for a period of sixteen days; that such tardy recordation produced a material change in the creditor status of each creditor so affected.

Wherefore, respondent, having fully answered the said petition, prays that an order be made herein:

(a) Declaring the said mortgage to be invalid as to general creditors of the said bankrupt estate, and decreeing the petitioner herein to be a general creditor;

(b) Ordering respondent, as such trustee, to retain the proceeds of sale of the said machinery and equipment for the account and for the benefit of general creditors; and

(c) For such other and further relief as to the Court may appear fit and proper.

/s/ FRANK M. CHICHESTER
BROOKS AND HOFFENBERG

/s/ By LON A. BROOKS,
Attorneys for Respondent

Duly Verified. [16]

Affidavit of Service by Mail Attached. [18]

[Endorsed]: Filed Mar. 9, 1955.

[Title of District Court and Cause]

UNION BANK AND TRUST COMPANY VS.
TRUSTEE MEMORANDUM BY REFEREE

The petitioner, Union Bank and Trust Company, has petitioned for reclamation of a sum of money, \$15,991.68, now in the hands of the trustee herein. This represents the proceeds of the sale of certain machinery and equipment under an order which transferred claims of lienors to the proceeds of sale. Petitioner's claim is based on notes and a chattel mortgage.

The trustee opposes the petition alleging that the Chattel mortgage is invalid as to him because of an unreasonable delay in recording the chattel mortgage after its execution.

On February 4, 1953 the original note and mortgage were delivered into an escrow set up with the petitioner, Union Bank and Trust Company, in an effort to comply with 3440.1 California Civil Code, which relates to the sale or [26] assignment of stocks in trade in bulk. Notice of intention to mortgage chattels was recorded on February 5th. The nature of the bankrupt's business did not require compliance with section 3440.1. On February 20, 1953, the escrow terminated by the terms of the escrow contract. On the same date, the chattel mortgage was recorded. It was stipulated that testimony would show that creditors existing prior to the recording were creditors at the time of bankruptcy.

Assuming that the escrow was proper, the date of execution is fixed by delivery at the termination of the escrow, section 1933, California Code of Civil Procedure. In *re Quartz Crystal Products Co.*, 71 F. Supp. 949, *Citizens Bank v. Gardner*, 161 F. 2d, 530. The recording occurred on the day the escrow terminated and was timely within the provisions of section 2957 California Civil Code. If the escrow was not effective, then the delivery occurred on February 4th and the 16 day delay in recording invalidates the mortgage as to creditors. *Williams v. Belling*, 76 C.A. 610. In *re Kessler*, 90 F. Supp. 1012.

The difficulty in this case arises from the fact that the purported delivery or deposit of the chattel mortgage in escrow was made with the petitioner who was also the mortgagee. Section 1056, California Civil Code, reads as follows:

“A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.”

The next section 1057 provides:

“A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in [27] the possession of the third person, and subject to condition, it is called an escrow.”

All of the texts, encyclopedias and cases I have examined agree that a party to a transaction cannot also act as escrow holder. I quote from 19 Am. Jur. 431:

“It is essential to an escrow that the instrument be delivered to a stranger or third person. The phrase ‘stranger’, or ‘third person’, as used in the definitions of escrow, means a stranger to the instrument, not a party to it, or a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty as a depositary to both parties without involving a breach of duty to either.”

To the same effect, 18 Cal. Jur. 2d, 324:

“The escrow holder must be a stranger to the

transaction which is the subject matter of the escrow, since the ancient rule that delivery of a deed to the grantee as an escrow is to be taken as an absolute delivery is incorporated in the Civil Code.”

No case has been cited by counsel nor have I found any which directly answers the question that has been raised. The petitioner relies on *Hotaling v. Hotaling*, 193 C. 368. In that case the court held that the rule of section 1056, Civil Code does not come into effect until there has been a delivery, and that delivery does not depend entirely on the “manual tradition” of the document, but that by change of possession of the document, the grantor must have intended to divest himself of title. In the absence of such intent “there was no delivery”. The ruling in this case cannot help the petitioner herein. If applicable, it would lead to the conclusion that there was no delivery and from that, that the chattel mortgage never became effective. In its decision, commenting on the rule of section 1056, Civil Code, the court said:

“The validity of this rule is not open to question, but it comes into application only when there has been a delivery.” [28] In the instant case the petitioner cannot deny delivery, otherwise it would be completely out of court. The other case is that of *Citizen’s Bank v Gardner*, 161 F. 2d 530. In this case the escrow holder and the mortgagee were the same person. I have examined the whole case and find that the question here involved was not raised in that case. It is fundamental that an appellate

court considers and acts only on the questions presented by the appeal. The only case I have found in which the rule of section 1056 was relaxed (if it was) in favor of a bank acting as escrow holder is that of *Portugese American Bank v Schultz*, 49 C.A. 508, wherein the court held that a subsequent assignment of notes held in escrow by a bank to the bank did not invalidate an escrow set up with the bank as escrow holder.

I am aware of the definition of the term "grant" in sec 1053, Civil Code. I conclude that chattel mortgages, which transfer in writing liens on personal property, come within this definition. *Rockefeller v Smith*, 104 C.A. 544 at 547. See also sec 1627, Civil Code. Even though chattel mortgages are excluded from the definition, the general principles of law concerning escrows would lead to the same conclusions that I have reached. 19 Am. Jur. 431, *supra*.

It is clear that in this case the delivery to the petitioner was intended as a delivery in escrow. The intended escrow holder was a party to the transaction. Therefore, under the law as I have found it to be, the delivery to the petitioner and mortgagee was absolute and took effect on February 4, 1953. The only alternative conclusion would be that there was no delivery. See *Hotaling v Hotaling*, *supra*. It follows that the mortgage was not timely recorded so that it is effective against creditors. [29]

I can take notice of the fact that in recent years, banks in California have set up escrow departments

which are separate from their other departments. In fact, in view of this separation from ordinary banking operations, I can see no reason why it would not be safe to relax the rule to permit the escrow department of a bank to act as escrow holder where the bank was a party in interest. However, this is a matter for the legislature.

Counsel for the respondent trustee may prepare, file and serve proposed findings of fact, conclusions of law and order to be entered in conformance with Local Rule 7a. [30]

Dated this 9th day of June, 1955.

/s/ DAVID B. HEAD

Referee in Bankruptcy

[Endorsed]: Filed June 9, 1955.

[Title of District Court and Cause.]

AMENDED (a) FINDINGS OF FACT, (b) CONCLUSIONS OF LAW, AND (c) ORDER DECREETING CHATTEL MORTGAGE INVALID AS TO TRUSTEE AND CREDITORS

Union Bank & Trust Co. of Los Angeles, by its attorney I. B. Kornblum, Esq., having filed with the undersigned Referee in Bankruptcy its Petition for Reclamation praying

(a) That an order be made establishing the validity of a certain note and chattel mortgage described in the said petition, and

(b) That Frank M. Chichester, the Trustee in Bankruptcy herein, be ordered to pay forthwith to the said bank as petitioner, out of the proceeds of sale of the above named bankrupt's machinery and equipment now retained by the said trustee under order of this Court, the sum of \$15,991.68, representing the sum allegedly due on the said note, together with such additional sum as shall have accrued thereon for interest under the terms and conditions of the note and mortgage, together with the sum of \$350.00 counsel fees to the petitioner's said attorney for his services rendered in connection with the petition so filed; and [31]

An Order to Show Cause why the said petition should not be granted having been issued by the undersigned Referee returnable on the 2nd day of March, 1955, at the hour of 10:00 o'clock A.M.; and hearing on the said Order to Show Cause and Petition having been continued by stipulation of the petitioner and the trustee, through their respective attorneys, to March 16, 1955, at 10:00 o'clock A.M.;

The said trustee, by his attorneys Brooks and Hoffenberg, having answered the said petition, alleging the invalidity of the said chattel mortgage as to the trustee by reason of an unreasonable delay in recording the mortgage after its execution;

The Order to Show Cause and the Petition came on regularly for hearing on the said 16th day of March, 1955, at 10:00 o'clock A.M., the petitioner Union Bank & Trust Co. of Los Angeles appearing by its attorney I. B. Kornblum, Esq., and the Trustee in Bankruptcy Frank M. Chichester appearing

by his attorneys Brooks and Hoffenberg, by Lon A. Brooks, Esq., the testimony having been taken and various exhibits having been received in evidence by reference to the files and records of this proceeding, and the matter having been argued by the attorney for the petitioner and the attorney for the trustee, and thereafter having been submitted on briefs and memoranda of authorities filed herein by attorneys for both the petitioner and the trustee, and the court having considered the testimony, the evidence and the records and files of this proceeding, and being fully advised in the premises, and having arrived at a decision, now makes and enters the following

Findings of Fact

I.

That under date of February 4, 1953, S. A. Willen Co., [32] a corporation, the debtor-bankrupt herein, executed its promissory note, payable to Union Bank & Trust Co. of Los Angeles, the petitioner herein.

II.

That under the said date of February 4, 1953, the said debtor executed a chattel mortgage to the said Union Bank & Trust Co. of Los Angeles, as mortgagee, securing payment of the said note.

III.

That on the said February 4, 1953, the said note and the said chattel mortgage securing its payment were manually delivered and deposited into an escrow set up with the petitioner Union Bank & Trust

Co. of Los Angeles, as escrow holder; that the said bank thereupon, and thereafter until February 20, 1953, was both mortgagee and escrow holder in the note-mortgage transaction between the debtor and the bank.

IV.

That said promissory note and said chattel mortgage were deposited into escrow as part of a transaction whereby S. A. Willen Company would borrow from the petitioner on February 20, 1953, sums of money, as more specifically set forth in said chattel mortgage, a copy of which is attached to the trustee's answer to the petition for reclamation. On said February 4, 1953, as part of said transaction, S. A. Willen Company executed a notice of intention to mortgage chattels, and as a part of the said transaction said notice of intention to mortgage chattels was recorded by the petitioner on February 5, 1953, in the office of the County Recorder of the County of Los Angeles, State of California. That said notice of intention to mortgage chattels provided that the executed mortgage would be delivered and the consideration therefor paid on February 20, 1953.

V.

That on the said February 4, 1953, and at all times [33] thereafter to the date of bankruptcy, the debtor's business was that of jobbing and manufacturing cotton products; that the mortgage by the debtor of machinery and equipment, as evidenced by the chattel mortgage executed to the said bank on February 4, 1953, was not the mortgage of the fixtures or store

equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner or dyer, or retail or wholesale merchant.

VI.

That by the terms of the escrow contract said escrow closed on February 20, 1953, and that on said date the said chattel mortgage was recorded in the office of the said County Recorder and that on said date the amount of the loan was paid to S. A. Willen Company.

VII.

That a period of sixteen days elapsed from the date said chattel mortgage was signed and deposited with the escrow department of petitioner and the date of its recordation.

VIII.

That creditors of the bankrupt estate existing prior to the date of recordation of the said chattel mortgage were such creditors at the time of bankruptcy; that during the interval between the date of execution of the said mortgage, February 4, 1953, and the date of recordation thereof, February 20, 1953, amounts of creditors' claims against the debtor were increased.

IX.

That upon the petition of the trustee herein and pursuant to stipulation of the attorney for the said bank and the attorneys for the trustee, and under order of this Court, the said trustee sold for cash

the machinery and equipment of the said bankrupt free of and from the lien of the said chattel mortgage; that the machinery and equipment so sold is that described in the said chattel mortgage; that the said trustee now holds and retains [34] the proceeds of and from the sale of the said machinery and equipment subject to any valid lien of the said chattel mortgage and subject further to the final order, judgment and decree of this Court, or the final order, judgment and decree of a court of competent jurisdiction, as to the validity of the said chattel mortgage.

X.

That the principal balance of the said note, at date of bankruptcy, was the sum of \$15,991.68.

XI.

That the trustee herein now has in his possession, as a part of the bankrupt estate, the equivalent in amount of the said balance, to wit, the sum of \$15,991.68, representing a portion of the proceeds of sale of the said machinery and equipment made under the order of this Court; that the said order transferred claims of lienors to the proceeds of sale.

XII.

That the petition of the said Union Bank & Trust Co. of Los Angeles filed herein on February 15, 1955, is a petition for reclamation of the said sum of \$15,991.68 representing the said portion of proceeds of sale, together with accrued interest thereon and the sum of \$350.00 for fees of petitioner's attorney.

Based on the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That the provisions of Section 3440.1 of the Civil Code of the State of California have no application to the transaction evidenced by the execution and delivery of the note and chattel mortgage here under consideration. [35]

II.

That the notice of intention to mortgage chattels recorded by the petitioner on February 5, 1953, was ineffective.

III.

That the escrow created by the note-mortgage transaction, in which the said bank was both the mortgagee and the escrow holder, was ineffective.

IV.

That the date of delivery of the said chattel mortgage was February 4, 1953; that such delivery was absolute and took effect on the said date.

V.

That by reason of the delay of sixteen days: from February 4, 1953, to February 20, 1953: in recording the said chattel mortgage, the rights of creditors were adversely affected; that the said delay was an unreasonable one and as such rendered the mortgage ineffective as against creditors and invalid as to the trustee.

VI.

That the lien of the said chattel mortgage is not a valid or subsisting lien as to the trustee or as to creditors of the bankrupt estate; that the claim of the petitioner Union Bank & Trust Co. of Los Angeles in these bankruptcy proceedings is not a valid secured claim.

VII.

That the petitioner Union Bank & Trust Co. of Los Angeles is not entitled to the relief prayed for in its petition and is entitled to take nothing by its said petition.

VIII.

That the Trustee in Bankruptcy is entitled to have the said chattel mortgage decreed to be invalid and of no force or effect [36] as to him, as such trustee, or as to creditors of the bankrupt estate.

IX.

That title to the sum of \$15,991.68 in cash described and set forth in the said petition, and now held and retained by Frank M. Chichester as Trustee in Bankruptcy as part of the proceeds of sale of the bankrupt's machinery and equipment, is vested in the said trustee for the benefit of all unsecured creditors of the debtor, and the petitioner has no valid lien thereon as against the trustee or the bankrupt estate; that petitioner bank has no title to the said sum, or any part thereof, except as a general unsecured creditor of the debtor to the extent of the amount for which its claim is allowed.

Order Decreeing Chattel Mortgage Invalid as to
Trustee and Creditors.

Pursuant to the foregoing Findings of Fact and
Conclusions of Law, it is

Ordered and Decreed:

I.

That the Petition for Reclamation of Union Bank
& Trust Co. of Los Angeles, filed herein February
15, 1955, be, and the same hereby is, denied, and that
the said bank take nothing by its said petition.

II.

That the chattel mortgage executed by S. A. Wil-
len Co., a corporation, now the bankrupt herein, in
favor of Union Bank & Trust Co. of Los Angeles,
under date of February 4, 1953, is, and is hereby de-
clared to be, invalid and of no force or effect as to
Frank M. Chichester, the Trustee in Bankruptcy
herein, or as to [37] creditors of the bankrupt es-
tate.

III.

That the sum of \$15,991.68 in cash described and
set forth in the said petition, and now in possession
of the said trustee be, and it hereby is declared to
be, a part of the net proceeds of the sale of the said
bankrupt's machinery and equipment, and as such
available to the trustee in the administration of the
bankrupt estate; that petitioner Union Bank &
Trust Co. of Los Angeles has no right, title, claim,
interest or lien thereto, therein, or thereon, save and

except as a general unsecured creditor of the bankrupt, and on the same basis as other general unsecured creditors to the extent that such claim may be allowed by this Court.

IV.

That the said trustee take, have and hold title to the said sum of \$15,991.68 for the benefit of all unsecured creditors of the bankrupt estate free from and of any security or lien whatsoever of the said chattel mortgage.

Done at Los Angeles in the Southern District of California, this 1st day of August, 1955.

/s/ DAVID B. HEAD,

Referee in Bankruptcy

BROOKS AND HOFFENBERG

By LON A. BROOKS,

Attorneys for Trustee

[38]

Affidavit of Service by Mail Attached. [39]

[Endorsed]: Filed Aug. 1, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER OF
REFEREE DATED AUGUST 1, 1955

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of the Union Bank & Trust Co. of Los Angeles for review of the order dated August 1, 1955, respectfully represents as follows:

I.

Petitioner is a secured creditor of the above named bankrupt and a reclaimant in the within bankruptcy proceedings.

II.

Petitioner is aggrieved by the order herein of the Honorable David B. Head, Referee in Bankruptcy, dated August 1, 1955, a copy of which order, together with the findings of fact and conclusions of law upon which it purports to be based, is attached hereto, marked Exhibit "A", and made a part hereof.

III.

Petitioner prays for a review of said order and complains that the court committed error in making the said order in the [40] following particulars:

(a) Said order is based upon an erroneous determination that the chattel mortgage in favor of petitioner became effective as a mortgage on February 4, 1953, the date it was signed and deposited in escrow, rather than February 20, 1953, the date on which the escrow closed.

(b) So much of Finding No. III as states that from February 4, 1953 until February 20, 1953, petitioner was both mortgagee and escrow holder in a note-mortgage transaction between the debtor and petitioner is erroneous and contrary to the evidence in that the evidence shows that both the petitioner and S. A. Willen Company intended that the mort-

gage be delivered and the consideration therefor paid on February 20, 1953, and shows that the mortgage did not become effective until February 20, 1953.

(c) Finding No. V is erroneous and contrary to the evidence in that the evidence shows that the debtor herein was in the business of jobbing and distributing cotton products and was, therefore, conducting the business of a wholesaler.

(d) The Referee failed to make a finding in accordance with the evidence that the chattel mortgage was not accepted until February 20, 1953, at which time the proceeds of the loan for which said chattel mortgage was security was paid to S. A. Willen Company.

(e) Conclusion of Law No. I is contrary to law and based upon erroneous findings of fact.

(f) Conclusion of Law No. II is contrary to law and is based upon erroneous findings of fact in that said notice of intention to mortgage chattels was effective, among other things, to indicate the intention of the parties as to the effective date of delivery of the chattel mortgage and was further effective as a compliance with Section 3440.1 of the California Civil Code.

(g) Conclusion of Law No. III is contrary to law and is based upon an erroneous application of Section 1056 of the California [41] Civil Code, which provides that a grant cannot be delivered to the

grantee conditionally, in that said section is not applicable to a chattel mortgage and that a chattel mortgage can be delivered conditionally.

(h) Conclusion of Law No. IV is contrary to law in that absolute and effective delivery of said chattel mortgage was on February 20, 1953.

(i) Conclusion of Law No. V is contrary to law and based upon erroneous findings of fact in that no delay in recording occurred at all since the delivery of said chattel mortgage was as of February 20, 1953, and for the further reason that even if delivery had been made on February 4, 1953, nevertheless, under the circumstances of this case, the delay in recording was justified and not unreasonable.

(j) Conclusions of Law Nos. VI, VII, VIII and IX are, and each of them is, contrary to law in that they are based upon erroneous Conclusions of Law Nos. I through V, inclusive, as hereinabove specified in subparagraphs (e), (f), (g), (h) and (i).

Wherefore, petitioner prays that said order be reviewed by a Judge herein in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said order be reversed, and that an order be made upholding the validity of petitioner's chattel mortgage and ordering the payment of the sums due petitioner as set forth in the Petition for Reclamation on file herein, and that petitioner have such other and further relief as is just and proper in the premises.

UNION BANK & TRUST CO. OF
LOS ANGELES

/s/ By ROBERT E. GETZ,
Its Vice-President,
Petitioner

LOEB AND LOEB

/s/ By ALFRED I. ROTHMAN,
Attorneys for Petitioner [42]

[Exhibit A is a duplicate of Amended Findings of Fact, etc. set out at pages 23-32 of this printed record.]

Affidavit of Service by Mail attached.

Duly Verified. [51]

[Endorsed]: Filed Aug. 11, 1955.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Ben Harrison, Judge of the
United States District Court, Southern District
of California, Central Division:

I, David B. Head, a Referee in Bankruptcy of
this court, do certify as follows:

The Union Bank and Trust Company filed its
petition herein for reclamation of the sum of \$15,-
991.68, representing a sum which was earmarked as
the proceeds of a sale by trustee of certain personal

property of the bankrupt against which the petitioner claims a lien by reason of a chattel mortgage.

The matter was heard, submitted and I filed findings, conclusions, and an order holding the chattel mortgage invalid as to the trustee and denying the petition. The petitioner has filed a petition for review.

The questions involved are discussed in a memorandum [52] opinion which I filed in the case.

I further certify the following documents:

1. Petition for Reclamation
2. Order to Show Cause on Petition
3. Answer to Petition for Reclamation
4. Memorandum by Referee
5. Substitution of Attorneys
6. Findings, Conclusions and Order
7. Reporter's Transcript of Proceedings
8. Exhibits 1, 2, 3, 4 and 5
9. Petition for Review

Dated: September 23, 1955.

Respectfully submitted,

/s/ **DAVID B. HEAD,**

Referee in Bankruptcy

[53]

[Endorsed]: Filed Sep. 23, 1955.

In the District Court of the United States, Southern
District of California, Central Division.

In Bankruptcy, No. 62,222-BH

In the Matter of S. A. WILLEN COMPANY, a
corporation, Bankrupt.

MEMORANDUM OPINION

This is a review of an order by a Referee declaring to be void and of no effect a certain mortgage held by the Union Bank and Trust Company of Los Angeles as against the Trustee in Bankruptcy upon certain property of the bankrupt estate. The amount alleged to be due the bank was \$15,991.68 held by the Trustee as proceeds of the sale of the mortgaged property, under a stipulation whereby the lien of the bank was transferred to the proceeds of the sale of the mortgaged property.

It appears from the record that on February 4, 1953, the mortgagor executed the instruments and manually delivered them to the bank in an escrow agreement with the Union Bank and Trust Company of Los Angeles, the intention of the parties being that the money involved should not be paid to the bankrupt until February 20, 1953, at which time the transaction was to be completed, the escrow closed and [54] the money passed. The mortgage was then to take full force and effect. It was recorded on the same date, February 20, 1953. It was stipulated that

certain creditors existed prior to the recording and were also creditors at the date of the bankruptcy.

The Referee held that the escrow itself was void because it was made to one of the parties of the transaction and not to a stranger, and that since it was void, the actual delivery of the mortgage took place on February 4, 1953, with the mortgage taking effect at that time. He also held the mortgage was a grant within the meaning of Section 1056 of the Civil Code of California, and the delivery of a grant to the grantee is necessarily absolute and cannot be conditional. Sixteen days thereafter was too long a time to withhold the chattel mortgage from recordation.

This court feels it is not necessary in this case to pass upon the question of the validity of the escrow. The act of the parties clearly indicates that the mortgage was accepted conditionally.

The Referee assumed the mortgage was a grant. I do not believe this is correct. A grant indicates a transfer or conveyance of title, while a chattel mortgage is a contract, whereby certain chattels are hypothecated as security for a debt, without change of possession or title. [Cal.C.C. 2920, West's Annotated Code; *Stewart v. Powers*, 98 Cal. 514, 33 P. 486 (1893); 10 Cal. Jur.(2d) 329, §43 and cases cited in Note 11.] A contract can always be delivered conditionally. [*Spade v. Cossett*, 110 Cal.App. 2d 782, 243 P. 2d 799 (1952).]

The evidence shows clearly that the delivery to the bank on February 4, 1953, was conditional in that

the money was not to be turned over and the transaction completed [55] until February 20, 1953. This intention is shown by the fact that there was recorded a notice of intention to execute and deliver this mortgage on February 20, 1953, when the consideration was to be paid. This notice was recorded in compliance with Section 3440.1 of the California Civil Code.

It must be remembered that a chattel mortgage is merely security for a debt and if there is no debt there is no mortgage. In this case the mortgage did not come into existence until February 20, 1953, when the bank paid over the money and at that time the mortgage became a lien. [Western Loan & Bldg. Co. v. Scheib, 23 P.2d 745; West's C.C. of Cal. & Annotations].

The Trustee urges that the mortgagor was a manufacturer and not a merchant but the Referee found that the mortgagor was not only a manufacturer but a jobber. A jobber has been recognized as a wholesaler. [Words & Phrases, Vol. 23, page 38]. But whether the mortgagor comes within the purview of Section 3440.1 is immaterial inasmuch as the chattel mortgage was delivered conditionally and did not become effective until the consideration had passed on February 20, 1953, the day of the recordation. It cannot successfully be contended that the chattel mortgage was not recorded promptly.

The order of the Referee is reversed and remanded with direction that the Referee proceed in

conformity with the opinions herein expressed.

Dated: This 15th day of December, 1955.

/s/ BEN HARRISON,

Judge

[56]

[Endorsed]: Filed Dec. 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Union Bank and Trust Co. of Los Angeles
and to Loeb and Loeb, its Attorneys:

You, and each of you, will please take notice that the Trustee in the above matter hereby appeals from the Order of Court heretofore filed on December 15, 1955; wherein the Order of the Referee declaring that certain chattel mortgage to be invalid was reversed.

Dated: January 17, 1956.

BROOKS AND HOFFENBERG

/s/ By GABRIEL HOFFENBERG,

Attorneys for Trustee

[57]

Affidavit of Service by Mail attached.

[58]

[Endorsed]: Filed Jan. 18, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 64, inclusive, contain the original

Petition for Reclamation;

Order to Show Cause Why Petition for Reclamation Should Not Be Granted;

Answer to Petition for Reclamation;

Memorandum by Referee;

Amended Findings of Fact, Conclusions of Law and Order Decreeing Chattel Mortgage Invalid as to Trustee and Creditors;

Petition for Review of Order of Referee Dated 8/1/55;

Referee's Certificate on Review;

Memorandum of Opinion;

Notice of Appeal;

Respondent's Designation of Contents of Record on Appeal;

Statement of Points Upon Which Appellant Intends to Rely; which, together with Petitioner's exhibits 1, 2, 3, 4 & 5, all in the above-entitled cause, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the

foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 17th day of February, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk

/s/ By CHARLES E. JONES,
 Deputy

In the District Court of the United States, Southern
District of California, Central Division.

In Bankruptcy No. 62,222-BH

In the Matter of: S. A. WILLEN COMPANY, a
corporation, Bankrupt.

HEARING RE: ORDER TO SHOW CAUSE;
UNION BANK AND TRUST COMPANY
VS. FRANK M. CHICHESTER, TRUSTEE,
RE PETITION IN RECLAMATION

Before: Honorable David B. Head, Referee in
Bankruptcy.

The following is a stenographic transcript of the proceedings in the above-entitled cause, which came on for hearing before the Honorable David B. Head, United States Referee in Bankruptcy, at his courtroom, 340 Federal Building, Los Angeles, Califor-

nia, at the hour of 10:00 o'clock a.m. on Wednesday, March 16, 1955.

Appearances of Counsel: For the Petitioner, Union Bank and Trust Company: I. B. Kornblum, Esq. For the Respondent, Trustee: Brooks & Hoffenberg, by Lon A. Brooks, Esq. [1*]

The Referee: Now, we come to the matter of S. A. Willen Company. The bank here is the moving party.

Mr. Kornblum: Yes. We have a petition for order to show cause. Does your Honor want the bank to put on its case first?

The Referee: I presume you can agree upon—perhaps we can and perhaps we can't—the fact that there was a chattel mortgage.

Mr. Kornblum: Yes, I have some photostatic copies here, and I have the custodian of the records of the bank here, in the event there should be any question of these documents. If counsel will stipulate, perhaps we might save some time.

Here is a photostatic copy. I think the Trustee has attached to his answer a copy of the photostatic copy of the mortgage.

Mr. Brooks: Yes.

Mr. Kornblum: This is not a photostatic copy, Mr. Brooks. (Hands document to counsel.) We can put that in evidence.

Does your Honor require that the custodian take

* Page numbering appearing at top of page of original certified Reporter's Transcript.

the stand to identify these? We can stipulate to these.

The Referee: See how much you can stipulate to. [2]

Mr. Brooks: We will stipulate, your Honor, just as soon as we can compare it.

Mr. Kornblum: I might state that the photostatic copy was furnished to me by the bank, so I think you will find it to be correct.

Mr. Brooks: If you say it is correct, we will so stipulate.

Mr. Kornblum: I don't say it is correct. The bank furnished it to me. I am offering it. I don't think there will be any dispute.

Mr. Brooks: I don't think there will be. We have an original which is a little different than the one offered by Mr. Kornblum.

Mr. Kornblum: We will offer this as the moving party's Exhibit 1.

The Referee: It will be Petitioner's Exhibit 1.

Mr. Kornblum: I have two notes, photostatic copies of notes, and you may examine them and I believe you will find them to be all right. I will offer them, if you will stipulate.

Mr. Brooks: What is it you would like to stipulate; that these are photostatic copies of the original notes?

Mr. Kornblum: That is right.

Mr. Brooks: So stipulated.

Mr. Kornblum: I offer now as the next in number on behalf of the moving party a note dated Febru-

ary 4, 1953, [3] for \$27,125.04. That will be our next in number.

The Referee: Petitioner's 2.

Mr. Kornblum: I offer as the next in number, as Petitioner's Exhibit 3, a note dated February 19, 1954, for \$10,425.

The Referee: It will be Petitioner's Exhibit No. 3.

(Mr. Kornblum hands documents to Mr. Brooks.)

Mr. Brooks: Is this the record of payment?

Mr. Kornblum: This is the copy of the records.

Mr. Brooks: Copy of what records? Is this the bank's records of payments made?

Mr. Kornblum: Yes; payments made ledger sheet.

Mr. Brooks: Showing payments made by the Wil-len Company?

Mr. Kornblum: Is that correct, Mr. Lukens?

Mr. Lukens: That is right.

Mr. Kornblum: Let me show these to Mr. Lukens, so he can identify them now.

Will you just examine these and see if this is the correct copy?

In the meantime, I will offer something else. I wish to offer a photostatic copy of Notice of Intention recorded on February 5, 1953. I would like to ask counsel through the Court, your Honor, if counsel has a photostatic copy of that Notice of Intention and whether it has been in their files during the pendency of these proceedings. [4]

Mr. Brooks: I can answer that. We do have such

a copy taken from the records just in the past few days.

Mr. Kornblum: You just took it in the past few days?

Mr. Brooks: That is right.

Mr. Kornblum: Not prior to the time you filed your answer?

Mr. Brooks: We took it on March 4, 1955.

Mr. Kornblum: That was subsequent to the time you filed your answer?

Mr. Brooks: Prior to that time.

The Referee: That doesn't make any difference.

Mr. Kornblum: It will make a difference as the case develops, your Honor. It doesn't make any difference technically.

Will you stipulate that that is a photostatic copy of the Notice of Intention?

Mr. Brooks: Correct.

Mr. Kornblum: I offer it as the next in evidence.

The Referee: That will be Petitioner's Exhibit 4.

Mr. Kornblum: Is this all right? Did you examine these?

Mr. Lukens: Yes, I did.

Mr. Kornblum: Are these correct?

Mr. Lukens: That is correct.

Mr. Kornblum: Are you through examining these? [5] This is a record of the bank's ledger sheet. Is that correct, Mr. Lukens?

Mr. Lukens: That shows the payments made on the notes; the amounts due.

Mr. Brooks: And the date, of course, of each payment recorded, with a notation at the top of one

of them, "Do not release any papers until the advance against this loan has been paid in full."

We have no objection. We will stipulate that they are the bank's records, if Mr. Lukens says so.

Mr. Kornblum: We offer these three sheets as our next in number.

The Referee: That will be Petitioner's Exhibit 5.

Mr. Kornblum: Now, your Honor, with these exhibits in evidence, I now wish to point out certain allegations in the Trustee's answer.

The Referee: Let us not argue this case now.

Mr. Kornblum: Well, the purpose of my asking the question was to point up something here which I think the Court should take notice of. That is not by way of argument. It is merely by way of—it is not evidentiary. However, the Court should take notice of the fact that nowhere in the answer and nowhere in the original petition is any reference made to the Notice of Intention; and with that statement that I wish your Honor to note, the Petitioner will rest. [6]

Mr. Brooks: Would the Court like to hear from us?

The Referee: If you have any evidence to offer, yes.

Mr. Brooks: The only evidence we have to offer is this, in support of our answer to the petition:

It relates to the names of creditors of the S. A. Willen Company as at the date of the execution of this mortgage, together with the amount owed to each of them; next, the names of the creditors of the corporation as of the date of the recordation of the

mortgage, together with the amount owed by each of them.

Mr. Kornblum says he is not familiar with this and, therefore, not in position to stipulate to it.

Mr. Kornblum: I will state this, counsel——

Mr. Brooks: Let me finish this in just a moment.

Mr. Kornblum: Excuse me.

Mr. Brooks: Mr. Hind, the certified public accountant who is associated with Mr. Mulherin and who made an investigation of these records, is in court. His testimony, if sworn as a witness, would be that these names and amounts are correct.

Are you willing to stipulate that that will be his testimony?

Mr. Kornblum: I am willing to stipulate that he will testify that way; that that will be his testimony.

Mr. Brooks: He will so testify, if sworn as a witness. [7]

Mr. Kornblum: All right. I wish to reserve, however, an objection as to the materiality of that, on the grounds it is incompetent, irrelevant and immaterial, and the Court may rule on that later. I just want to reserve my rights.

The Referee: Very well.

Mr. Brooks: He certainly has a right to reserve that. I merely want to get this before the Court. Mr. Hind may not be kept here, if he is not needed. May he be excused?

The Referee: Yes.

Mr. Kornblum: Yes. May Mr. Lukens be excused now? I don't think we will need him as a witness for the bank.

Mr. Brooks: I don't need him, as far as we are concerned.

The Referee: Both witnesses may be excused.

Mr. Brooks: Mr. Hind, just one moment before you go, I have one other thing.

If the Court please, with reference to the names of the creditors and amounts owed to each as of the time of bankruptcy, Mr. Hind would also testify that—well, I don't think that is necessary. That is a matter of record.

Mr. Kornblum: Yes.

Mr. Brooks: All right. That is all we have in the [8] way of evidence, your Honor. I have prepared a memorandum brief on the matter here, which I would like to submit, and if the Court would like to hear from me further with respect to our position on the matter of intention and the matter of mortgage generally, I will be glad to respond to what counsel has said. We cover it in our brief.

Mr. Kornblum: I would like at this time to make several motions in regard to the answer, to strike certain portions of the answer, so that we can get the issues clarified. If I may do that at this time, your Honor, I think that will help us get the issues clarified.

Mr. Brooks: Well, I would assume that Mr. Kornblum may reserve any statements until he has made any motion.

Mr. Kornblum: I am not making any statements. I am trying to help the Court get all the facts before it so that we can argue it clearly.

Mr. Brooks: As soon as you make your motion, we will proceed.

Mr. Kornblum: I want to move now, your Honor, to strike the Allegation No. 6 on page 5, which states: "That the respondent is further informed and verily believes, and therefore alleges, (a) each of the said notes purported to be secured by the said chattel mortgage is endorsed by Joseph Spiegleman, as guarantor, and that each thereof now bears his endorsement; and (b) said Joseph Spiegleman is the father-in-law of Martin G. Kaplan, one of the [9] partners of the firm of Los Angeles Cotton Company, one of the creditors of the estate of said bankrupt," on the grounds that it is absolutely redundant and has nothing to do with the issues in this case, as far as I can see.

In my opinion, this furnishes—I suspected this, but this is now confirmed in my mind as being the motivation of the position taken in this matter. I think it is absolutely incompetent, immaterial and irrelevant and has nothing to do with the issues in this case whether Mr. Spiegleman is the father-in-law of Martin G. Kaplan, one of the creditors, because there is no showing and there is no attempt to show that Martin G. Kaplan of the Los Angeles Cotton Company profited by this. I don't see what the purpose of it is, except that it does furnish the motive for me, which I will argue later.

I make that motion for the purpose of the record.

Mr. Brooks: Is your motion to strike the entire paragraph?

Mr. Kornblum: That paragraph, yes—no; I will withdraw that.

I move to strike subdivision (b) of that paragraph, because subdivision (a) is merely a recitation of a fact.

The Referee: All right.

Mr. Brooks: We stipulate it may go out. [10]

Mr. Kornblum: All right. That subdivision (b) may go out.

The Referee: All right.

Mr. Brooks: Beginning with the words “said Joseph Spiegleman,” and subdivision (a) remains.

Mr. Kornblum: Subdivision (a) may remain. That is all right.

Now, I believe that is the only motion.

Mr. Brooks: Have you finished?

Mr. Kornblum: I don’t know how the Court wants this matter argued, whether he wants me to argue first or for you to argue first.

Mr. Brooks: Well, I take it we should hear from the moving party first. I will be glad to respond to it.

The Referee: There is only one point involved in this case, as I see it. That is whether the delay in recordation has been explained. Isn’t that the question, gentlemen?

Mr. Brooks: That is our view of the case exactly. May I, before we begin, supplement what the Court has said?

Mr. Kornblum: I just want to get this clear, counsel. Pardon me.

I don’t think there was a delay in recordation,

which the Court refers to. The Notice of Intention was filed. [11]

The Referee: Well, your instrument is dated February 4th, and it was recorded on February 20th.

Mr. Kornblum: No, your Honor. The Notice of Intention was under Section 3440.

The Referee: Your instrument is dated February 4th, and it was recorded on February 20th.

Mr. Kornblum: Yes, but there is in evidence a Notice of Intention.

The Referee: As I say, the question is now: Does that explain your delay in recording?

Mr. Kornblum: Well, if I may look at that Notice of Intention, the Notice of Intention states that it will not be paid until — the money will not be turned over until the 20th. In other words, so that I get the situation clear in my mind, this Notice of Intention states as follows:

“That S. A. Willen Corporation, mortgagor, whose address is 5871 West Jefferson Street in the City of Los Angeles, County of Los Angeles, State of California, intends to mortgage to the Union Bank and Trust Company of Los Angeles, mortgagee, whose address is 760 South Hill Street in the City of Los Angeles, County of Los Angeles, State of California, machinery and equipment of a certain manufacturing business known as S. A. Willen Company and located at 5871 West Jefferson Street in the City of Los Angeles, County of Los Angeles, State of California, and that an executed mortgage of the same will be delivered and [12] consideration therefor

paid at 10:00 o'clock a.m. on the 20th day of February, 1953, at the Escrow Department of the Union Bank and Trust Company at 760 South Hill Street in the City of Los Angeles, County of Los Angeles, State of California. Dated February 4, 1953." It is signed S. A. Willen Company, mortgagor, by S. A. Willen, president, and Norton B. Le Vine, secretary-treasurer. It was subscribed and sworn to before a notary public.

Now, the document was recorded as Document No. 3308 at the request of the Union Bank and Trust Company on February 5, 1953, at the hour of 4:30 p. m. in Book 40907, page 152, Official Records, County of Los Angeles, California.

Now, that explains the delay, because the Notice of Intention says that the money will not be paid over until the 20th and until this money is paid over, they couldn't record it.

The Referee: When was the money paid over?

Mr. Kornblum: On the 20th day of February.

The Referee: I was looking at the record here. I can't make it out.

Mr. Kornblum: Maybe I shouldn't have let Mr. Lukens go. But the money was paid at the time. There is an escrow and on the 20th day of February—in other words, the bank even took perhaps a longer time than the law even requires to give notice to creditors. Now, when the——

The Referee: It shows here apparently that the [13] money was advanced on "2-23-54," and——

Mr. Kornblum: And they didn't have to advance it until 2-20.

The Referee: And 2-24——

Mr. Kornblum: That is 1953. There seems to be some confusion in the pleadings. It is 1953.

The Referee: 2-24-53?

Mr. Kornblum: That is right.

The Referee: Then, you have another record over here, which is another advance made, "2-23-54."

Mr. Kornblum: That is right. Now, if your Honor will look at the mortgage, there is a provision in the mortgage which——

The Referee: The date I was looking for here is the date of the first advance.

Mr. Kornblum: It was three days after the 20th. In other words, here is what happened. The bank took exceeding precaution. They not only gave the notice that it will be for a longer period than required by Section 3440, but they do not even give them the money until three days after the time when they could have given it to them.

Does that clear up the record as far as what your Honor was asking about?

The Referee: I just want the date the money was advanced.

Mr. Kornblum: That is the date. There is a lot of [14] confusion, I see, in the answer. You probably want—the date here is incorrect.

Mr. Brooks: What is the date?

Mr. Kornblum: On page 7 at the top of the page, "date of recordation thereof, to wit, February 20, 1954." You want to change that to 1953?

Mr. Brooks: Yes; change that to 1953.

Mr. Kornblum: Is that a typographical error?

Mr. Brooks: That is a typographical error. The answer should be February 20, 1953.

The Referee: What page is that?

Mr. Kornblum: At the top of page 7 of their answer.

Mr. Brooks: The first line.

Mr. Kornblum: On the first line. I assumed that that was a typographical error and in our stipulation, there was a similar typographical error made in the original petition you filed. We tried to correct it. Then, evidently, the same mistake was made.

Mr. Brooks: They will know that it is February 20, 1953. It shows in the document itself.

Mr. Kornblum: What I want to point out and the reason I asked the question is this: This is the first time I knew they had even examined the records to find out that there was a Notice of Intention, because I can state as far as I am concerned, that had they searched the [15] records and had they known that a Notice of Intention to mortgage was filed, and had they examined the law carefully, in my opinion, this thing never would have been filed, because there was no reason for it. This thing does not make sense. The bank has complied with all the provisions of the law and even went further than is required by the law.

Now, all the allegations, and the reason I reserved my objections as to materiality, as to who was a creditor at what time, I think is immaterial.

The question is: Was this mortgage made in accordance with the laws of the State of California, and if so, whether the Notice of Intention to Mort-

gage was noticed and if it was noticed, it doesn't make any difference who the creditors were or what amounts they were in.

The point is that the burden now shifts. As far as we are concerned, I believe we have made out a case. We have complied with the law and the presumption is that it is made in good faith.

Now, the Trustee comes in and says—and here are the allegations in their answer, your Honor. Now, I want to point this out——

The Referee: I have read the answer.

Mr. Kornblum: Their answer is that at the time that the creditors had no notice and this is without foundation. [16]

The Referee: Let us hear from Mr. Brooks then.

Mr. Brooks: If it please the Court, counsel is exactly correct. We have examined the records and tried to examine all of them with utmost care. He places great stress on the Notice of Intention.

Mr. Kornblum: I beg your pardon?

Mr. Brooks: I say, you have placed great stress on the Notice of Intention. We have made no reference to it, of course, for the reason that we believe it is entirely superfluous. It is not and cannot and does not take the place of recordation. The Code specifically requires recordation.

Now, the section under which we are proceeding and the section in which we are interested here is I think Section 2957 of the Code, which requires recordation.

Now, in response to what your Honor has just said about the question presented, we think that is

exactly it. First of all, is a mortgage withheld from record beyond a reasonable time required for its prompt recordation void as to creditors? And the second point is: Is a delay of 16 days in the recording of a mortgage immediately following its execution a reasonable delay as to the rights of those creditors?

The Referee: No; 16 days is too long. I don't know a single case in California which permitted a delay of 16 days, but the point here, Mr. Brooks, as I see it, is that [17] this mortgage was not delivered until December 20th, and if it was recorded on the date of its delivery——

Mr. Brooks: That is February 20th.

The Referee: February 20th, yes. We are all mixed up in the dates.

Mr. Brooks: I was instrumental in causing the confusion. I subscribe to the fact, at least, that it is February 20th.

The Referee: The mortgage here was delivered on February 20th, and that is the effective date of the mortgage. Moneys were not transferred until three days after that, and the mortgage was recorded apparently on the same date it was delivered.

Mr. Brooks: That is correct.

The Referee: The date of delivery is the date. That is the effective date of the mortgage.

Mr. Brooks: We are going on this point: That it is the date of the mortgage, the date of execution that was misleading to the creditors; that it lulled them into a sense of false security, because the date——

The Referee: No; no. The only knowledge that the creditors can be charged with would be the recordation date.

Mr. Brooks: The recordation?

The Referee: Yes, and if any of the creditors would be affected by Section 3440, then the notice that [18] was given on February 4th, that is, the recorded notice of February 4th, would be notice to perhaps some class of the creditors.

I don't think it is necessary to go into Section 3440. I think what we are concerned with here is: What is the effective date of this mortgage, which appears to me to be February 20th?

Mr. Brooks: It is our contention that Section 3440 has no application here. I take it from what the Court has said, that he is inclined to agree.

The Referee: I think we can disregard it.

Mr. Brooks: All right. What is in the Court's mind is the effective date of the mortgage. The escrow has been referred to here. Apparently, an escrow was entered into. I see no necessity for that. My interpretation of the authorities is that recordation must be made immediately upon execution or as soon thereafter as may be practical so as to give notice and to bind third parties. Otherwise, the mortgage is void.

It seems to me that the cases — I think we have summarized all of them — go to that very thought, the date between the date of execution and the date of recordation, and that it must be recorded regardless of the date the money was advanced. It must be

recorded immediately after its execution, or as soon as practical.

Now, that, I think, sums up the whole case. [19]

The Referee: You are dealing here with a transaction in which in order for this chattel mortgage to become effective, it had to be executed and delivered.

Mr. Brooks: All right. It was executed 16 days before delivery, or at least 16 days before delivery. It must be executed, of course——

The Referee: This chattel mortgage became effective upon its delivery, which was February 20th, and it was recorded the same day.

Mr. Brooks: Well, it is the date of execution that we are going to, and it seems to me that the cases swing around that point; that recordation is required immediately after execution or as soon as may be practical.

We have an escrow here, which it seems to me was an idle act. We have a mortgage executed on February 4th and was not recorded until the 20th, 16 days later. The date of execution, it seems to me, is not only vital but perhaps determinative in this whole thing in the light of the decisions. We don't think that——

The Referee: Give me a decision where there is a question of the date of execution overriding the date of delivery.

Mr. Brooks: Well, recordation is held generally and I think it takes the place of delivery.

The Referee: No; no. Recordation is notice.

Mr. Brooks: Notice to the world. [20]

The Referee: That is right.

Mr. Brooks: All right. I am referring now to Wolpert vs. Gripton. Your Honor is familiar with that case. That is 213 Cal. 474, in which it is held that creditors at the time of execution, and those who continued as such to the time of recordation, suffered prejudice and were injured by the delay in recording, and those whose claims arose during the interval between execution and recordation definitely parted with value after execution.

The Referee: You will find any number of cases where it refers to execution and when these executions——

Mr. Brooks: And recordation.

The Referee: There has been no question raised there whether there was a difference between the date of execution and the date of delivery.

Mr. Brooks: Correct.

The Referee: Now, we have had in this Bankruptcy Court in the last few years where this question has arisen, but I can't tell you of any reported cases right on this particular subject about this difference in the date of execution and the date of delivery.

Mr. Brooks: The latest case I have in the Federal courts is one which your Honor is perfectly familiar with, I am sure, because it is a recent one. It is the matter of *In re Kessler*. The facts are very closely parallel. The Bank of America sent the mortgage to the Recorder's [21] office to be recorded.

The Referee: Yes.

Mr. Brooks: And they asked for a bill and there was some delay there, a delay of 14 days.

The Referee: I know, but the mortgage had been executed and taken over to the Clerk's office. It was tangled up in the Recorder's office, and it was 14 days before they got the fee paid.

Mr. Brooks: That is right, but our position is based solely upon that interval existing between the date of execution and the date of recordation. That is the whole thing.

I believe that I have summarized all the cases here, and I believe they sustain that view. May I hand up my memorandum and give a copy to counsel?

The Referee: All right. Have you got a case that supports your position, Mr. Kornblum, right squarely?

Mr. Kornblum: I have not prepared any. Counsel hasn't served me with any file brief.

My position is that the delivery of the money was made at the time the mortgage was delivered on the 20th, at the time which the notice stated the transaction and the escrow would be closed, and all things which took place prior to that time do not affect this matter.

The delivery, as your Honor has said, of the mortgage, the delivery of the money is the effective date. [22] Now, I don't think counsel can find anything that will—well, I still say that Section 3440 is a very material factor involved in this thing, because it gave notice to creditors that there was an escrow,

and it is not true that the creditors had no notice, as alleged in the answer.

Mr. Brooks: You are referring to the Notice of Intention?

Mr. Kornblum: Well, that they had no notice. Notice of Intention under Section 3440 provides that once that is filed, the presumption is that it is made in good faith and you have to overcome the presumption. In other words, our position is that the burden shifts to anyone who questions the good faith and the validity.

The burden, in my opinion, shifts now to the Trustee to prove that it was not made in good faith. Their allegations in the answer here, in my opinion, haven't been sustained. There is nothing here, nothing before the Court, that will sustain any of the allegations that the bankrupt has stated here on page 4, which fact the Union Bank as a named mortgagor now or ever had cause to believe.

Those allegations are not proper in view of the fact that an intention was filed, because the presumption is that once the notice under Section 3440 is filed, the burden shifts.

Mr. Brooks: Maybe I can help the Court. [23]

The Referee: You set up an escrow and, as I say, under the terms of the escrow this mortgage was not delivered to you until February 20th.

Mr. Kornblum: That is correct.

The Referee: And that is the effective date, and it was recorded at the time of the delivery.

Mr. Kornblum: On the same day.

The Referee: If recording is required within a

reasonable time after February 4th, why then, of course, you have gone over too far.

Mr. Brooks: Maybe I can help the Court. I see exactly what is in the Court's mind. You are wondering whether what you call the effective date of the mortgage may take the place of the date of execution.

The Referee: That is right.

Mr. Brooks: I wonder if we might submit a memorandum on that specific point. We have covered the other points and I am convinced that Section 3440 has no application because it specifically excludes mortgages.

The Referee: It makes no difference if it applies here or not. We presume there is good faith here, and there was an escrow set up,——

Mr. Brooks: That is correct.

The Referee: (Continuing)——for the purpose of giving notice under Section 3440, and by the provisions of that escrow that mortgage was not to be delivered until [24] February 20th at a certain time——

Mr. Brooks: I know the Court's point, and there is only one point. That is it, if we may submit a memorandum of authorities.

The Referee: (Continuing)——and that is when the mortgage was delivered; and as I say, no moneys were advanced prior to that time, so no credit was obtained by reason of that mortgage until after February 20th, so no creditor giving credit during, say, from February 4th to February 20th——

Mr. Brooks: Yes, there were.

The Referee: No. I say, no creditor giving credit during that period of time would have been damaged. He would not be giving credit without knowledge of a lien that had been created, because no lien had been created, no mortgage had been delivered and no moneys had been advanced.

Mr. Brooks: That is right.

The Referee: No secured debt had been created.

Mr. Brooks: But if he had notice of the execution of the mortgage on February 4th, he may well have dealt with the debtor differently than he did.

The Referee: Then, if he had gone over and looked at the recording of notices of intention, then he would have seen that they did intend to deliver the mortgage on February 20th. [25]

Mr. Brooks: A notice of intention, we believe, can never take the place of recordation. Anything can happen.

The Referee: The point is, I believe, the effective date here is February 20th. While I can't give you the name of the case, I have held that in previous cases.

Mr. Brooks: Maybe we can find it.

The Referee: That is the date of delivery.

Mr. Brooks: If we can submit a memorandum on it——

The Referee: I don't know whether you can find it or not.

Mr. Brooks: I am talking about the case you have in mind.

The Referee: There was a decision by Judge Yankwich in a case—I have no memory for names.

Mr. Brooks: I can give it to you in just a moment.

The Referee: It was on the question of a conditional sales contract of mining machinery.

Mr. Brooks: I believe that is it. Is that In re Hanson? That was his case.

The Referee: No, that is not that citation. That is not his case. That is 268 Fed.

Mr. Brooks: 268 Fed.?

The Referee: He doesn't date back to 268 Fed. He dates back, but not that far.

Mr. Brooks: Not that far, no. [26]

The Referee: There is a decision by Judge Yankwich which involves the recording of a conditional sales contract on mining machinery, which under the laws of California must be recorded within the county where the machinery is located, I believe, in order to be effective against creditors, and there is a question of date of delivery in that case.

I don't want to state what it concludes, in his words, but I do remember the case.

Mr. Brooks: I had in mind Mercury Engineering.

The Referee: That is not the case.

Mr. Brooks: That is 68 Fed. Supp.

The Referee: The case I am referring to is subsequent to Mercury Engineering.

Mr. Brooks: Mercury Engineering would not be it, because it involved a purchase money mortgage.

The Referee: Let us let this matter stand submitted. Now, if you find anything further on that matter——

Mr. Brooks: We will file it.

Mr. Kornblum: I will expect counsel to file it, and if he files it, I will respond to it.

The Referee: All I want you to do is bring me a letter saying, read case so-and-so. That is all you need to do.

Mr. Kornblum: If we find one on that. [27]

The Referee: Yes.

Mr. Kornblum: I just want to call your Honor's attention to the significance of Section 3440. I think it is important, because the intention—here is the Notice of Intention, and the Notice says, "That an executed mortgage of the same will be delivered."

That is the point—I mean, that is why this is material. It states in that many words that the mortgage will be delivered and consideration paid on the 20th.

Now, that states when the delivery was to be made, and that, I think, in the absence of any showing to the contrary, will have to be accepted.

The Referee: I think so, too.

Mr. Kornblum: That is the whole point.

Mr. Brooks: I believe the Court thinks that will take the place of recordation.

Mr. Kornblum: No.

The Referee: No; that is the effective date. After February 20th, there must be a timely recording; after that date rather than that February 4th date.

Mr. Brooks: Rather than the date of execution?

The Referee: That is right.

Mr. Kornblum: That is right.

The Referee: I think February 20th is the gov-

erning date here. As I say, I have previously held so, and I think you are wrong. [28]

Mr. Kornblum: Does your Honor wish any time set for the filing of any further memorandum?

The Referee: Do this within the next four or five days, or a week.

Mr. Kornblum: We will make it a week.

Mr. Brooks: A week; that is better.

Mr. Kornblum: With regard to the other petition in connection with the payment of attorney's fees, if your Honor should sustain the Petitioner's position, the note prays that if any action has to be taken, a reasonable attorney's fee as set by the Court will be paid. Now, I have put it very reasonable.

The Referee: How much have you indicated?

Mr. Kornblum: \$350. I think that is extremely reasonable in view of——

The Referee: You have only spent an hour here today.

Mr. Kornblum: I have done other work. My file is very voluminous.

The Referee: I am talking about the litigation. You drew up the pleadings.

Mr. Brooks: It should be paid by his client.

Mr. Kornblum: Not if the Petitioner's position is sustained. I believe that the mortgage itself provides it and the notes, that this will have to be paid by you. I don't think there is any question about it.

The Referee: I will make an allowance.

Mr. Kornblum: Thank you.

(Whereupon the hearing was concluded.) [30]

[Endorsed]: Filed July 22, 1955.

[Endorsed]: No. 15038. United States Court of Appeals for the Ninth Circuit. Frank M. Chichester, Trustee in Bankruptcy of Estate of S. A. Willen Company, a corporation, bankrupt, Appellant, vs. Union Bank & Trust Co. of Los Angeles, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 18, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

Case No. 15038

FRANK M. CHICHESTER, Trustee,

vs.

UNION BANK & TRUST CO.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Statement of Points

The points upon which the appellant will rely on appeal are:

1. The Court erred in reversing the order of the referee decreeing the chattel mortgage invalid as to the trustee and creditors.

2. The Court erred in refusing to pass upon the question of the validity of the escrow wherein the mortgagee was also the escrow holder.

3. The Court erred in holding that the chattel mortgage was delivered conditionally as against the rights of intervening creditors where the referee found that the mortgage was delivered "absolutely".

4. The Court erred in holding that whether the mortgage comes within the purview of Section 3440.1 is immaterial inasmuch as the chattel mortgage was delivered conditionally.

5. The Court erred in refusing to hold that the delivery of the mortgage to the mortgagee-escrow holder was an absolute delivery to the mortgagee on February 4, 1953.

6. The Court erred in refusing to hold that the provisions of the Civil Code of California applying to grants in escrow apply to all written instruments.

7. The Court erred in failing to consider the effect on the rights of creditors of the execution and deposit of a mortgage in an ineffective escrow held by the mortgagee as escrow holder.

8. The Court erred in finding that according to the terms of the escrow contract the amount of the loan was paid to the bankrupt on February 20, 1953, when the record clearly shows that the money was actually paid over to the bankrupt on February 24th, 1953.

9. The Court erred in holding that the mortgage came into existence on February 20, 1953, when the bank paid over the money, while the record clearly

shows that the bank did not pay over the money until February 24th, 1953.

10. The Court erred in failing to hold that there was no debt in existence at the time of recordation of the mortgage on February 20, 1953.

11. The Court erred in failing to consider the effect on the rights of creditors, of the recordation of the mortgage before the debt, for which the mortgage is security, came into existence.

12. The Court erred in failing to consider the validity of the mortgage which was recorded four (4) days prior to the time that the money was paid over to the debtor.

13. The Court erred in failing to consider the effect on the rights of creditors, of the delay of sixteen days between the execution and recordation of the mortgage.

Designation of Record

Appellant in the above-entitled action designates the following portions of the record, proceedings and evidence to be contained in the record on their appeal in the above-entitled action:

1. Petition for reclamation filed February 15, 1955.

2. Order to show cause why petition for reclamation should not be granted filed February 15, 1955.

3. Answer to petition for reclamation filed March 9, 1955.

4. Memorandum by the referee dated June 9,

1955 ruling that the chattel mortgage invalid as to the trustee and creditors.

5. Substitution of Attorneys, signed by the Union Bank and Trust Company on June 20, 1955, consented to by I. B. Kornblum on June 20, 1955, and accepted on June 23, 1955 for Loeb and Loeb by Alfred I. Rothman.

6. Referee's amended findings of fact, conclusions of law, and order decreeing chattel mortgage invalid as to the trustee and creditors dated August 1, 1955.

7. Petition for review of order of referee dated August 1, 1955 filed August 11, 1955 excluding amended finding of fact, conclusions of law and order decreeing chattel mortgage invalid as to the trustee and creditors.

8. Referee's certificate of review to the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division.

9. Memorandum opinion by Honorable Judge Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division, reversing the order of the referee.

10. Notice of appeal filed January 18, 1956.

11. Reporter's Transcript of proceedings, Wednesday, March 16, 1955, 10:00 A.M., before Honorable David B. Head, Referee in Bankruptcy.

12. Appellee-petitioner's exhibit No. 1, Chattel Mortgage.

13. Appellee-petitioner's exhibit No. 2, Note, dated February 4, 1953, in the amount of \$27,125.04.

14. Appellee-petitioner's exhibit No. 3, Note, dated February 19, 1954, in the amount of \$10,-425.00.

15. Appellee-petitioner's exhibit No. 4, Notice of intention, recorded on February 5, 1953.

16. Appellee-petitioner's exhibit No. 5, three ledger sheets of the Union Bank and Trust Company re S. A. Willen Co.

17. This appellant's statement of points upon which the appellant will rely on appeal and designation of the record to be contained in the appeal in the above-entitled action.

Dated: This 5th day of March, 1956.

BROOKS & HOFFENBERG and
GABRIEL HOFFENBERG

/s/ By GABRIEL HOFFENBERG,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 6, 1956. Paul P. O'Brien,
Clerk.



No. 15038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee, in Bankruptcy of Estate of S. A. WILLEN COMPANY, a corporation, bankrupt,

Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,

Appellee.

APPELLANT'S OPENING BRIEF.

BROOKS & HOFFENBERG,
GABRIEL HOFFENBERG and
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Attorneys for Appellant.

FILED

JUN 19 1956

PAUL P. O'BRIEN, CLERK

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No. 15038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee, in Bankruptcy of Estate of S. A. WILLEN COMPANY, a corporation, bankrupt,

Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal from a decision of the District Court reversing, on a Petition for Review, an Order of the Referee in Bankruptcy. Jurisdiction of the District Court existed under Section 67(c), Title 11, U. S. C. A.

Jurisdiction of this Court on appeal exists under Section 47 of Title 11, U. S. C. A.

Statement of Case.

This appeal is taken from an order of the District Court in favor of the appellee, the Union Bank & Trust Company of Los Angeles (hereinafter referred to for convenience as "Bank"), reversing an order of the Referee holding invalid, as against creditors and the Trustee in Bankruptcy, appellant herein, a chattel mortgage ex-

cuted by the S. A. Willen Company (hereinafter referred to for convenience as "Willen"). The nature of this dispute can best be set forth by a summary of the events leading to this appeal.

On February 4, 1953, Willen, a corporation, executed its note and chattel mortgage to the Bank as mortgagee. On February 4, 1953, the note and chattel mortgage securing its payment, were manually delivered and deposited by Willen into an escrow set up with the Bank. The Bank thereupon and thereafter, until February 20, 1953, was both escrow-holder and mortgagee. On February 4, 1953, as a part of the same transaction, Willen executed a Notice of Intention to Mortgage Chattels and the said Notice of Intention to Mortgage Chattels was recorded by the Bank on February 5, 1953, in the office of the County Recorder of the County of Los Angeles, State of California. The said Notice of Intention to Mortgage Chattels provided that the executed mortgage would be delivered and the consideration therefor paid on February 20, 1953. The Notice of Intended Mortgage provided for the mortgage of the machinery and equipment of a certain manufacturing business known as S. A. Willen Company. [Appellee's Ex. 4; R. p. 73.]

On February 20, 1953, the escrow closed and on that date the Bank recorded the chattel mortgage in the Office of the County Recorder. On February 24, 1953, the money constituting the consideration for the note and chattel mortgage securing its payment, was paid by the Bank to Willen.

On July 29, 1954, Willen filed its voluntary petition in bankruptcy in the District Court for the Southern District of California, Central Division.

Pursuant to a stipulation, on November 16, 1954, the Referee in Bankruptcy ordered that Frank M. Chichester as Trustee of the bankrupt estate be permitted and directed to sell and dispose of the machinery and equipment covered by the chattel mortgage, free and clear of and from the lien of the chattel mortgage and hold the proceeds subject to the lien of the said mortgage. Thereafter, the Trustee did, pursuant to said order, sell said machinery and equipment, retaining from the proceeds therefrom the sum of \$15,991.68, being the amount of the obligation yet secured by the chattel mortgage.

On February 15, 1955, the Bank filed its Petition for Reclamation, asking that an order be made and entered declaring that the note and chattel mortgage held by the Bank to be a valid note and chattel mortgage. It was stipulated that creditors existing prior to February 4, 1953, were still creditors at the time of bankruptcy.

Thereafter, on June 9, 1955, the Referee held that, inasmuch as the note and chattel mortgage had been delivered to the Bank as both mortgagee and escrow holder, the chattel mortgage was delivered absolutely on February 4, 1953, and that the delay of sixteen days between February 4, 1953 and February 20, 1953, the date of the recordation of the chattel mortgage, was so unreasonable as to render the chattel mortgage invalid

as against the Trustee and creditors. Thereafter, on August 1, 1955, the Referee made and entered his order declaring said chattel mortgage to be invalid and of no force and effect as to Frank M. Chichester, the Trustee in Bankruptcy, and as to creditors of the bankrupt estate.

Thereafter, on August 11, 1955, the Bank filed its Petition for Review of the Referee's Order. The Judge of the District Court, by his Memorandum Opinion dated December 15, 1955, reversed the order of the Referee, and held that the chattel mortgage had been delivered conditionally to the Bank on February 4, 1953, and that the mortgage did not come into existence until February 20, 1953, at which time the money was purportedly paid, and the mortgage was recorded.

Thereafter, on January 18, 1956, the Trustee in Bankruptcy filed a notice of appeal to the Court of Appeals.

Specification of Errors.

1. The Court erred in refusing to pass upon the question of the validity of the escrow wherein the mortgagee was also the escrow holder. [R. p. 70.]

2. The Court erred in refusing to hold that the delivery of the mortgage to the mortgagee-escrow holder was an absolute delivery to the mortgagee on February 4, 1953. [R. p. 70.]

3. The Court erred in failing to consider the effect on the rights of creditors of the execution and deposit of a mortgage in an ineffective escrow held by the mortgagee as escrow holder. [R. p. 70.]

4. The Court erred in finding that according to the terms of the escrow contract the amount of the loan was paid to the bankrupt on February 20, 1953, when the record clearly shows that the money was actually paid over to the bankrupt on February 24, 1953. [R. p. 71.]

5. The Court erred in holding that the mortgage came into existence on February 20, 1953, when the bank paid over the money, while the record clearly shows that the bank did not pay over the money until February 24, 1953. [R. pp. 70-71.]

6. The Court erred in failing to consider the effect on the rights of creditors, of the recordation of the mortgage before the debt, for which the mortgage is security, came into existence. [R. p. 71.]

7. The Court erred in failing to consider the validity of the mortgage which was recorded four (4) days prior to the time that the money was paid over to the debtor. [R. p. 71.]

8. The Court erred in failing to consider the effect on the rights of creditors, of the delay of sixteen days between the execution and recordation of the mortgage. [R. p. 71.]

Summary of Argument.

It is appellant's contention that the following is determinative in this appeal:

1. Willen's execution as mortgagor, on February 4, 1953, of its promissory note and chattel mortgage, and its deposit of the same in escrow with the Bank as both

mortgagee and escrow holder resulted in an invalid escrow, inasmuch as the Bank could not properly act as both mortgagee and escrow holder.

2. The deposit of the chattel mortgage by Willen on February 4, 1953, in escrow with the Bank as mortgagee—escrow holder constituted an absolute delivery of the chattel mortgage to the Bank on February 4, 1953.

3. Inasmuch as the chattel mortgage was absolutely delivered to the Bank on February 4, 1953, the delay of sixteen (16) days to February 20, 1953, at which time the chattel mortgage was recorded in the Office of the County Recorder, was unreasonable, and rendered the chattel mortgage invalid as to creditors in existence on February 4, 1953, who were also creditors at the time of bankruptcy.

4. Assuming, however, that the invalid escrow can be disregarded and it is held that a conditional delivery resulted therefrom, the chattel mortgage must still be held invalid as to creditors. The event upon which the delivery to the Bank was conditioned was the passing of the consideration from the Bank to Willen. The evidence clearly shows that the consideration did not pass until February 24, 1953, four (4) days *after* the Bank had recorded the mortgage. Inasmuch as a mortgage has no existence apart from the debt, and inasmuch as the debt, and, therefore, the mortgage, did not come into existence until *after* the recordation on February 20, 1953, the recordation was a nullity and did not constitute notice to creditors.

ARGUMENT.

I.

The Bank Could Not Properly Act as Both Mortgagee and Escrow Holder. As Mortgagee the Bank Was a Party Directly Interested in the Mortgage Transaction and Thereby Was Precluded From Acting as Escrow Holder in the Same Transaction.

The Referee found that on February 4, 1953, Willen, as mortgagor, executed his note and chattel mortgage in favor of the Bank, and on that date “manually delivered and deposited” said note and chattel mortgage “into an escrow” set up with Bank, and that the Bank “until February 20, 1953, was both the mortgagee and escrow holder.” [R. pp. 25-26.] The Referee concluded from these facts that the Bank could not properly act as its own escrow holder.

The District Court, however, in its decision felt it unnecessary to pass upon the question of validity of the escrow. [R. p. 39.]

To quote from the District Court’s memorandum:

“This court feels it is not necessary in this case to pass upon the question of the validity of the escrow.” [R. p. 39.]

It is the contention of the appellant, however, that the question of the validity of the escrow must be decided before the validity of the chattel mortgage may be determined. The validity of the chattel mortgage is dependent on the validity of its delivery and the validity of the

delivery of the chattel mortgage in turn is dependent on the validity of the escrow.

The authorities all agree that a party to a transaction cannot also act as escrow holder:

“It is essential to an escrow that the instrument be delivered to a stranger or third person. The phrase ‘stranger’ or ‘third person,’ as used in the definition of an escrow, means a stranger to the instrument, not a party to it, or a person so free from any personal or legal identity with the parties to the instrument, as to leave him free to discharge his duty as a depository to both parties without involving a breach of duty to either.”

19 *Am. Jur.* 431.

“And he must be a stranger to the transaction which is the subject matter of the escrow.”

18 *Cal. Jur.* 2d 324.

In the recent 1956 California case of *Roberts v. Carter*, 140 A. C. A. 387, at page 389, the Court says in discussing the functions of an escrow holder:

“He must be a stranger to the transaction which is the subject matter of the escrow.”

The law in California respecting the deposit of instruments in escrow is set forth in the Civil Code:

“*Delivery in escrow.* A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depository, it will take effect. *While in the possession of the third person*, and subject to condition, it is called an escrow.” (Emphasis added.)

Civ. Code, Sec. 1057.

The above Code Section is a codification of the Common Law rule that an escrow required that the subject matter of the transaction be placed in possession of a third party—a stranger to the transaction—pending the performance of the condition for which the escrow was created.

The District Court in its memorandum decision seems to beg the question as to whether or not a chattel mortgage is proper subject matter to comply with Section 1057 of the California Civil Code, *supra*.

Section 1057 of the Civil Code refers to a grant while Section 2920 of the Civil Code defines a mortgage as a contract:

“Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.”

Civ. Code, Sec. 2920.

While a mortgage is a contract, it is still proper subject matter for an escrow.

In 10 *Cal. Jur.* 577, it is stated:

“The term ‘grant’ as used in the definition of an escrow given by the Civil Code is comprehensive enough to include instruments other than deeds. And it follows that contracts, notes, options . . . and other personal property may all be subject of delivery in escrow.”

See, also,

Carr v. Howell, 154 Cal. 372.

In *Sousa v. First California Co.*, 101 Cal. App. 2d 533 at 539, citing Civil Code, Section 1057, and involving a check deposited in escrow, the Court states:

“An instrument is ‘deposited in escrow’ when in accordance with an agreement to that effect *it is deposited with a third person* to be delivered to the other party to the agreement on the performance of a specified condition.” (Emphasis added.)

The Court, in *Rockefeller v. Smith*, 104 Cal. App. 544 at 547, states:

“The term ‘grant’ as used in the definition of an escrow given by the Civil Code is comprehensive enough to include instruments other than deeds.”

The authorities in California agree that a chattel mortgage, although a contract, falls within the provisions of Section 1057 of the Civil Code of California and must be deposited with a third person, a stranger to the transaction, to constitute a valid escrow. It must therefore be concluded from the authorities: (Appellant was unable to find any authority to enable a bank in California to act as escrow holder in a transaction in which it is a party):

- (a) That the delivery to the bank was intended as a delivery in escrow;
- (b) That the intended escrow holder was a party to the transaction and not a stranger to the transaction so as to qualify as such holder;
- (c) That the escrow was invalid and ineffective.

II.

The Delivery and Deposit by the Mortgagor of an Executed Note and Chattel Mortgage With the Mortgagee Bank Acting as Escrow-holder for the Transaction on February 4, 1953, Constituted an Absolute Delivery on That Date.

It is clear in this case that delivery to the bank of the chattel mortgage was intended as a delivery in escrow. [R. pp. 25-26, 20, 38.] The intended escrow holder was a party to the transaction and therefore the escrow was void and ineffective as set forth in Argument I.

The question now presented is: What is the effect of the delivery and deposit of a chattel mortgage with the mortgagee as escrow holder? It would appear that if the escrow itself is void, then there must be absolute delivery on the date of execution, or, in the alternative, there is no delivery, with the result that the mortgage never became effective.

Application of California Civil Code, Sections 1056, 1057 and 1053, and the law as stated by the California Appellate Court in *Rockefeller v. Smith, supra*, leads to only one conclusion, which is the conclusion reached by the Referee, that the delivery to the Bank, acting as both mortgagee and escrow-holder, was absolute and took effect on February 4, 1953:

“The infallible test of delivery is the fact that the grantor has divested himself of all dominion and control over the conveyance.”

Jones on Chattel Mortgages, Vol. 1, p. 190, sec. 112.

Section 1056, California Civil Code reads:

"Delivery to grantee is necessarily absolute. A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

Section 1057, California Civil Code, reads:

"Delivery in escrow. A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow."

Section 1053, California Civil Code reads:

"A transfer in writing is called a grant, or conveyance, or bill of sale. The term 'grant,' in this and the next two articles, includes all these instruments, unless it is specially applied to real property."

California Civil Code Sections 1056, 1057 and 1053, leave no doubt that a grant cannot be delivered to the grantee conditionally, the delivery to the grantee is absolute.

The Referee in his Decision [R. p. 22] states:

"I am aware of the definition of the term 'grant' in sec. 1053, Civil Code. I conclude that chattel mortgages, which transfer in writing liens on personal property, come within this definition. Rockefeller v. Smith, 104 Cal. App. 544 at 547. See also sec. 1627, Civil Code. Even though chattel mortgages are excluded from the definition, the general

principles of law concerning escrows would lead to the same conclusions that I have reached. 19 Am. Jur. 431, *supra*."

Section 1627, California Civil Code reads:

"The provisions of the chapter on transfers in general, concerning the delivery of grants, absolute and conditional, apply to all written contracts."

Section 2920, California Civil Code reads:

"*Mortgage, what.* Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession."

Section 1626 of the California Civil Code reads:

"*Contract in writing, takes effect when.* A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."

The Referee, in his Memorandum Decision, takes into consideration California Civil Code, Sections 1053, 1056, 1057 and 1627, and the law as stated in *Rockefeller v. Smith, supra*, in arriving at his conclusion:

"It is clear that in this case the delivery to the petitioner was intended as a delivery in escrow. The intended escrow holder was a party to the transaction. Therefore, under the law as I have found it to be, the delivery to the petitioner and mortgagee was absolute and took effect on February 4, 1953."
[R. p. 22.]

A grant is defined by Civil Code, Section 1053, as a transfer in writing. The question as to whether a chattel mortgage comes within that definition is answered by

Civil Code, Section 1066, which says that grants are to be interpreted in like manner with contracts in general, and by Civil Code, Section 1627, which provides that Sections 1053, 1056 and 1066 apply to *all written contracts*, which necessarily include chattel mortgages.

The Referee in his Memorandum Decision quotes the case of *Rockefeller v. Smith*, *supra*, in arriving at his conclusion that contracts and grants come within the definition of the term "grant" in the California Civil Code. Appellant attaches importance to this case because it quotes and explains the California Civil Code sections forming the basis of the Referee's decision.

California Civil Code, Sections 1626, 1053 and 1627, are cited and quoted in *Rockefeller v. Smith*, 104 Cal. App. 544, 547-548, as follows:

" 'A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent. (Civ. Code, sec. 1626.) Delivery of the instrument is the final act essential to its consummation as an obligation' . . .

" 'A transfer in writing is called a grant, or conveyance or bill of sale. The term "grant" in this and the next two articles includes all these instruments, unless it is specially applied to real property.' (Civ. Code, sec. 1053.)

" 'The term "grant" as used in the definition of an escrow given by the Civil Code as comprehensive enough to include instruments other than deeds. . . .

" 'The provisions of the chapter on transfers in general, *concerning the delivery of grants*, absolute and conditional, apply to all written contracts. (Civ. Code, sec. 1627.) . . .

“ ‘A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow.’ (Civ. Code, sec. 1057.)

“ ‘Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

“ ‘1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

“ ‘2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presented.’ (Civ. Code, sec. 1059.)”

In 10 *Cal. Jur.*, at page 577:

“The term ‘grant’ as used in the definition of an *escrow* given by the Civil Code is comprehensive enough to include instruments other than deeds. And it follows that contracts, notes . . . and other personal property may all be the subject of delivery in escrow.”

In 18 *Cal. Jur.* 2d 303, 304:

“The Civil Code provides . . . that a grant deposited by the grantor with a third person, to be delivered on the performance of a condition and to take effect on delivery by the depositary, is called an escrow while in the possession of the third person, and that in this connection the term ‘grant’ embraces transfers in writing irrespective of whether they refer to real, or to personal property.”

The authority as stated in the California Civil Code Sections as well as case law is that chattel mortgages come within the definition of Civil Code, Section 1053.

In this case the grantor intended to deliver the chattel mortgage to the Bank in escrow. The Bank was a party to the escrow. Therefore, as held by the Referee, the delivery to the Bank as mortgagee was absolute and took effect on February 4, 1953.

The only alternative conclusion would be that there was no delivery. Such a conclusion that there was no delivery would lead to the further conclusion that the chattel mortgage never became effective. In *Hotaling v. Hotaling*, 193 Cal. 368, the Court held that the rule of Section 1056, Civil Code, does not come into effect until there has been a delivery, and that that delivery does not depend on the "manual tradition" of the document, but that by change of possession of the document, the grantor must have intended to divest himself of title. In the absence of that intent there was no delivery. In this case the intention of the mortgagor was to deliver the chattel mortgage into a valid escrow. The escrow was invalid and ineffective and therefore delivery in an invalid escrow would constitute no delivery at all. To quote the Referee's Memorandum [R. p. 21]:

"In the instant case the petitioner cannot deny delivery, otherwise it would be completely out of court."

Therefore, it must be concluded, as was held by the Referee in his Memorandum Decision, that delivery to the Bank as mortgagee was absolute and took effect on February 4, 1953.

III.

A Delay of Sixteen Days Between the Execution and Delivery of a Chattel Mortgage and the Recording Thereof Is so Unreasonable a Delay as to Render the Mortgage Void as Against Creditors.

The appellant contends, as argued above, that the chattel mortgage was delivered to the bank on February 4th and that sixteen days' delay in its recordation, on February 20th, was so unreasonable as to make it ineffective as against creditors. In order for a mortgage to be valid as against creditors, it must be promptly recorded.

Civil Code, Section 2957, provides that a mortgage of personal property is void as against creditors of the mortgagor unless it is recorded in the office of the County Recorder.

While Section 2957 does not in itself provide for prompt recordation, the question as to what constitutes prompt recordation and the purpose thereof is discussed in a number of both California and Federal decisions.

In *Hopper v. Keyes*, 152 Cal. 488, beginning at 493, the court, in adopting and affirming the opinion of the District Court of Appeal, refers to an elaborate and signally able opinion by Justice Henshaw in *Ruggles v. Cannedy*, 127 Cal. 295, by saying:

“ . . . it is held that the recordation of the mortgage, having been designed by the statute as a substitute for and equivalent of immediate delivery and continued change of possession under the former system in vogue in this state, should be had immediately, or as near thereafter as practicable, upon the execution of the mortgage, in order to give notice to and bind third parties.

"It must be conceded that the authority for the creation of chattel mortgages in this state derives its force from the statutory provisions relating to the subject, and that all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions.

"That the recordation of the mortgage, under our present system, is one of the necessary and indispensable requisites to protect the rights of the mortgagee against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, is a self-evident proposition.

"It must be remembered, in general, that the policy of the law is against secret liens and charges to the injury of innocent purchasers or encumbrancers for value, and in particular, that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to give notice to the world of the character of the transaction." (Emphasis added.)

Recordation should be had immediately upon execution, or as soon thereafter as practical, in order to give notice to and bind third parties; otherwise, the mortgage is void as to those persons (including creditors) enumerated in Section 2957 of the Civil Code.

In the matter of *In re Kessler*, decided by the District Court May 26, 1950, and reported in 90 Fed. Supp. 1012, the facts were similar to those here under consideration. There a delay of fourteen days in recording was held to be unreasonable (p. 1017).

In the *Kessler* case the chattel mortgage was acknowledged October 10. On October 11 the bank forwarded the mortgage to the Los Angeles County Recorder with a request that it be recorded and the bank billed for the recording fees. On October 14 the Recorder received the mortgage, placed it in a "hold" file, and mailed the bank a statement showing the fees required for recordation. The Recorder received in due course the bank's check dated October 23 as payment of the recording fees and on October 24, duly recorded the mortgage (p. 1014).

Prior to execution of the chattel mortgage there were creditors of the mortgagor whose claims still remained unpaid when on December 16, 1948, Kessler was adjudged bankrupt upon an involuntary petition filed November 30, 1948. At the filing of the petition the bankrupt was in actual or constructive possession of all property mentioned in the mortgage (p. 1014).

On January 3, 1949, the receiver, alleging that the bank's mortgage was invalid by reason of delayed recordation, petitioned the bankruptcy court for an order, requiring the bank to appear and show what lien, if any, it had upon the fixtures and equipment. A hearing was had and the Referee held the mortgage to be invalid (p. 1014).

The District Court, in confirming the order of the Referee, says at page 1017:

"Section 2957 of California's Civil Code provides that a chattel mortgage is 'void as against creditors' if not recorded. Since recordation takes the place of 'immediate delivery' . . . required by Cal. Civil Code Section 3440, a mortgage must be recorded as soon after execution as practicable in order to be valid as against creditors. (Citing numerous cases.)

“Unreasonable delay in recordation will void a mortgage even as against existing creditors. (Citing authority.)

“In the proceeding at bar, there were existing creditors of the mortgagor whose claims remained unpaid at the filing of the involuntary petition in bankruptcy. The bank delayed recordation of the mortgage for 14 days from the time of execution. . . . Such a delay is unreasonable. (Citing authority.) . . .

“The mortgage is invalid as against the receiver and general creditors because of . . . *unreasonable delay in recordation.*” (Emphasis added.)

The California Appellate Courts likewise have found that an unreasonable delay in recording will render a mortgage void as to creditors. And in *Williams v. Belling*, 76 Cal. App. 610, it also was held that a delay of fourteen days was unreasonable.

At pages 615 and 616 the Court there says:

“By section 2957 of the Civil Code it is provided that a mortgage of personal property is void as against creditors of the mortgagor . . . unless it is . . . recorded in like manner as grants of real property; and in *Ruggles v. Cannedy*, 127 Cal. 290, it is held that the recordation of a chattel mortgage, having been designed by the statute as a substitute for and the equivalent of the immediate delivery and continued change of possession formerly required in this state, should be had immediately or as soon thereafter as practical upon the execution thereof in order to give notice to and bind third parties.

“In the instant case it might fairly have been inferred that fourteen days had elapsed between the delivery of the mortgage and its recordation. Such delay, although not affecting its validity between the parties, . . . would, if not shown to be excusable, render the mortgage void as to creditors . . . whose claims were created during the interval. (Citing authorities.)”

The California authorities seem to be in accord in stating the principle that recordation is a substitute for delivery and change of possession, and that the recording of a mortgage is made by the Civil Code the equivalent of an immediate delivery and continued change of possession.

In discussing this principle the California Supreme Court in *Ruggles v. Cannedy*, 127 Cal. 290, asserting that an indefinitely delayed recordation will not take the place of an actual immediate delivery, says, beginning at page 296:

“One being designed as a substitute for the other, what is the condition, in the one case, if the property be not immediately delivered? Indisputably, the mortgage is void as to creditors. What, then, is the condition in the other case for the indefinite period during which there has been no recordation? *While recordation is lacking there is not only no equivalent for an immediate delivery, but there is no delivery at all. Recordation itself is the substitute for delivery.*

“‘A prompt recordation most obviously takes the place of an immediate delivery, and a delayed recordation of a tardy delivery.’

“ . . . A mortgage without immediate delivery would create a secret lien, admittedly void against creditors. Is a mortgage without immediate recordation any less a secret lien, or any less an evil to be avoided?” (Emphasis added.)

Ruggles v. Cannedy, *supra*, was decided by the Supreme Court of California in 1899. The United States Court of Appeals, in 1934, in *Swift v. Higgins*, 72 F. 2d 791, 795, declares that “the case of *Ruggles v. Cannedy* is still the law of California.”

An unrecorded chattel mortgage, or one whose recordation has been unduly delayed, has been held to be void as to antecedent creditors and those who became creditors of the mortgagor during the period of time between execution and recordation.

Noyes v. Bank of Italy, 206 Cal. 266, 272;

United Bank & Tr. Co. v. Powers, 89 Cal. App. 690, 695.

It is therefore firmly established law both by decisions of the California Courts and the Federal Courts that a mortgage must be promptly recorded to be effective as against creditors.

In *Williams v. Belling*, 76 Cal. App. 610, a fourteen day delay was held to be unreasonable and the mortgage void as to creditors.

In *re Kessler*, 90 Fed. Supp. 1012 (S. D. Cal., 1950), a fourteen day delay was held to be unreasonable and the mortgage void as to creditors.

In *Summerville v. Kelliher*, 144 Cal. 155, a fifteen day delay was held not to invalidate the mortgage. This

case is clearly distinguishable from the instant case. Quoting from the *Summerville* case at page 157:

“No rights were acquired, nor was any prejudice suffered by either *Summerville*,¹ or *Herson*² during the interval between the date of execution and the date of recording.”

¹Execution purchaser.

²Trustee in bankruptcy.

In the instant case there were rights of existing creditors as well as rights of intervening creditors accruing between date of execution and date of recordation.

In *re Mercury Engineering*, 68 Fed. Supp. 376 (S. D. Cal., 1946), a twenty-six day delay in recordation was held not to invalidate the mortgage. The *Mercury Engineering* case can be distinguished from the instant case in that the mortgage there was a *purchase money mortgage*, and therefore intervening creditors' rights were not affected.

To quote Judge Yankwich (p. 379):

“California Courts do not seem to have been called upon to determine whether its provisions* apply to a purchase price chattel mortgage. But the Referee rightly concluded that it did not so apply upon no less an authority than the Circuit Court of Appeals for the Second Circuit, whose opinions upon a matter of this character interpreting a New York statute of identical import with ours command not only respect, but require following when no contrary ruling in our own Circuit appears.”

*(Section 2957 of the Civil Code of California supplied.)

In *Citizens National Trust & Savings Bank v. Gardner*, 161 F. 2d 530 (C. C. A. 9), a purchase money mortgage

was also involved. Again there were no intervening creditors' rights. Quoting from the case at page 532:

"The mortgage involved here was in the nature of a *purchase money mortgage* in that all of the proceeds of appellant's loan were used by the bankrupts to help *acquire new assets*." (Emphasis added.)

The Court in the *Citizens Bank* case (p. 533) quotes *In re Mercury Engineering Co.* as follows:

"When we require notice before sale of stock in trade, we do so in order that the basis on which the prior credit has been secured be not dissipated without notice. But when the basis did not exist, but came into being through the very sale and incumbrance, the very foundation for the requirement is gone."

In the case of *In re Heningsen*, 291 Fed. 684, affirmed 297 Fed. 821, seven weeks was held to be not an unreasonable delay. That case can be distinguished in that the mortgage was in reality a substitution of an existing properly recorded mortgage and a change of existing security for the same creditor. The rights of creditors were in no way affected, as in the case at bar, between execution and recordation.

The court there said (297 Fed. 821, 822-823):

"The function of the mortgage here attacked was merely to take the place of another mortgage which had been duly recorded for a long time. It is submitted that the actual filing of this mortgage was contemporaneous with the withdrawal or extinguishment of the *Weiss* mortgage. The mortgage at bar was no more than a change of security for the same creditor. Under such circumstances we think there was no unreasonable delay in filing."

From a study of the facts in this and the authorities cited, including statutes and State and Federal Court decisions, it must be concluded that a delay of sixteen days in recordation of the mortgage in question was unreasonable and the mortgage invalid as to creditors.

IV.

Assuming That the Chattel Mortgage Was Accepted Conditionally, Its Recordation on February 20th Was a Nullity Because the Debt for Which It Was Security Did Not Come Into Existence Until February 24th, Four Days After the Recordation.

While it is the contention of the appellant that the delivery of the chattel mortgage to the Bank as mortgagee and escrow holder was absolute and took effect on February 4, 1953, the result reached by the District Court would still be contrary to existing law regarding when a mortgage becomes effective as a mortgage.

The District Court in its Memorandum felt that it was unnecessary to pass upon the question of the validity of the escrow inasmuch as it concluded that the mortgage had been accepted conditionally. To quote from the Court's Opinion:

"This court feels it is not necessary in this case to pass upon the question of the validity of the escrow. The act of the parties clearly indicates that the mortgage was accepted conditionally." [R. 39.]

It would appear that the Court in effect creates a conditional acceptance out of an invalid escrow. As set forth in I and II, an invalid escrow can lead to only two conclusions. There is either an absolute delivery or there is no delivery. The Court reaches its conclusion of a conditional acceptance by ignoring the escrow agreement, ignor-

ing the intentions of the parties to set up an escrow and ignoring the ineffectiveness of the escrow in law. While the appellant does not agree with this conclusion, it is felt that a discussion of the law regarding when a mortgage becomes effective is important.

It is well established that there cannot be a mortgage unless there is a debt or obligation which can be secured thereby.

In *Coon v. Shry*, 209 Cal. 612, the Court states the law, at page 615:

“However, we have no hesitancy in holding, in accordance with well-settled principles, that the mortgage must stand or fall with the note. It is well settled in California that a mortgage or mortgage lien is a mere incident of the debt or obligation which it is given to secure. (Cal. Civ. Code, sec. 2909; 17 Cal. Jur. 710, sec. 27, and cases cited in footnote 11.) There cannot be a mortgage if there is no debt or other obligation to be secured. (*Holmes v. Warren*, 145 Cal. 457, 463 [78 Pac. 954]; *Todd v. Todd*, 164 Cal. 255, 258 [128 Pac. 413]; *Ahern v. McCarthy*, 107 Cal. 382, 386 [40 Pac. 482].) A mortgage in California has no existence independent of the thing secured by it. (*Estate of Fair*, 128 Cal. 607, 613 [61 Pac. 184]; *People v. Eastman*, 25 Cal. 601, 603.) As distinguished from the debt the mortgage has no determinate value. (*Nagle v. Macy*, 9 Cal. 426.)”

To quote from the District Court Memorandum Opinion:

“It appears from the record that on February 4, 1953, the mortgagor executed the instruments and

manually delivered them to the bank in an escrow agreement with the Union Bank and Trust Company of Los Angeles, the intention of the parties being that the money involved should not be paid to the bankrupt until February 20, 1953, at which time the transaction was to be completed, the escrow closed and the money passed.” [R. p. 38.]

The Court held in this case that the mortgage did not come into existence until February 20, 1953, when the Bank paid over the money.

To quote the District Court’s Memorandum Opinion:

“It must be remembered that a chattel mortgage is merely security for a debt and if there is no debt there is no mortgage. In this case the mortgage did not come into existence until February 20, 1953, when the bank paid over the money and at that time the mortgage became a lien. (*Western Loan & Bldg. Co. v. Scheib*, 23 P. 2d 745; West’s C. C. of Cal. and Annotations.)” [R. p. 40.]

The record shows, however, that the money was not paid over to Willen until February 24, 1953, and that there was no debt in existence on February 20, 1953, the date the chattel mortgage was recorded.

Appellee-petitioner’s Exhibit No. 5, three ledger sheets of the *Union Bank and Trust Company re S. A. Willen Company* [R. 73] shows that the money was advanced on February 24, 1953.

Reporter’s Transcript of proceedings, Wednesday, March 16, 1955, 10:00 A. M., before Honorable David B. Head, Referee in Bankruptcy, shows that the money was advanced on February 24, 1953. [R. p. 55.]

To quote from the Reporter's Transcript:

"The Referee: *When was the money paid over?*

Mr. Kornblum: On the 20th day of February.

The Referee: I was looking at the record here. I can't make it out.

Mr. Kornblum: Maybe I shouldn't have let Mr. Lukens go. But the money was paid at the time. There is an escrow and on the 20th day of February—in other words, the bank even took perhaps a longer time than the law even requires to give notice to creditors. Now, when the—

The Referee: It shows here apparently that the (13) money was advanced on '2-23-54,' and—

Mr. Kornblum: And they didn't have to advance it until 2-20.

The Referee: And 2-24—

Mr. Kornblum: *That is 1953.* There seems to be some confusion in the pleadings. It is 1953.

The Referee: 2-24-53?

Mr. Kornblum: That is right." (Emphasis added.)
[R. pp. 54-55.]

The record clearly shows, as pointed out, that the money was advanced to the mortgagor (Willen) on February 24, 1953, while the chattel mortgage which was the purported security therefor was recorded on February 20, 1953. There was no debt in existence on February 20, 1953. If, as the District Court held, the mortgage was accepted conditionally, the condition being the advancing of the money, it must follow therefore that the mortgage was *not capable* of recordation on February 20, 1953.

The law is well established in California that a mortgage has no existence independent of the thing secured.

Estate of Fair, 128 Cal. 607.

It is also well settled that a mortgage or mortgage lien is a mere incident of the debt or obligation which it is given to secure.

California Civil Code, Sec. 2909.

It must therefore be concluded that the recordation of the chattel mortgage on February 20, 1953, was totally ineffective and no lien could have arisen as there was no debt in existence for which it could be security.

Conclusion.

Upon the authorities cited and for the reasons set forth herein, appellant respectfully submits that the Referee's Decision should be reinstated and the Decision of the District Court should be reversed. It is submitted by appellant that the Bank, as a party to the mortgage transaction, could not properly act in an escrow both as mortgagee and escrow holder, and that the escrow therefore was invalid, and that the delivery of the mortgage to the Bank, as mortgagee and escrow holder, constituted an absolute delivery on the date of such delivery. Appellant further submits that the delay of sixteen days from the date of such absolute delivery to the date of recordation, was unreasonable as to the rights of creditors and that therefore the mortgage was invalid as to the Trustee and as to creditors.

Assuming, however, that a conditional acceptance can be construed from the ineffective escrow, appellant submits that the mortgage must still be held invalid as to creditors. The passage of the consideration and the creation of the debt was the condition upon which the acceptance was conditioned, and the debt for which the mortgage was security did not come into existence until four days after the recordation of the mortgage. Inasmuch as the law is well settled that the mortgage has no existence apart from the debt, the premature recordation was a nullity and rendered the mortgage invalid as to creditors.

Respectfully submitted,

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No. 15038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee, in Bankruptcy of Estate
of S. A. WILLEN COMPANY, a corporation, bankrupt,
Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,
Appellee.

APPELLEE'S BRIEF.

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FILED

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No. 15038

IN THE

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FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee, in Bankruptcy of Estate
of S. A. WILLEN COMPANY, a corporation, bankrupt,
Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,
Appellee.

APPELLEE'S BRIEF.

STATEMENT OF JURISDICTION.

1. The District Court's jurisdiction was properly invoked under Section 67c, Title 11, U. S. C. A.
2. Jurisdiction of this court is believed to exist under Section 47 of Title 11, U. S. C. A.

STATEMENT OF THE CASE.

The following implementation and correction of the statement of the case set forth in appellant's opening brief is deemed necessary:¹

¹Although not pertinent to the present appeal, it should nevertheless be noted that the statement on page 3 of appellant's brief that the sum of \$15,991.68 is the amount secured by the chattel mortgage is not accurate. The actual amount due is the stated sum together with interest and attorneys' fees.

1. The amount of the loan was paid by appellee to S. A. Willen Co. on February 20, 1953, and not on February 24, 1953. [Finding VI, R. p. 27.]

2. Interest on the promissory note was adjusted through escrow to February 20, 1953. [Ex. 2.]

3. The District Court in its memorandum opinion accepted the Referee's finding that the money was paid on February 20, 1953. The District Court in its memorandum opinion further found that the delivery of the chattel mortgage to the Bank on February 4, 1953, was conditional in that the money was not to be turned over and the transaction completed until February 20, 1953. [R. pp. 39-40.]

4. The District Court in its memorandum opinion found that on February 4, 1953, the mortgage was accepted conditionally by appellee. [R. p. 39.]

SUMMARY OF THE ARGUMENT.

A chattel mortgage is not a grant, nor is it a transfer. A chattel mortgage is a contract and therefore it can be delivered conditionally to the mortgagee to take effect upon performance of the specified conditions. Section 1056 of the California Civil Code, which states that a grant cannot be delivered to the grantee conditionally and that if such delivery is made it will be deemed absolute, is not applicable to chattel mortgages. The chattel mortgage was legally delivered on February 20, 1953, and since it was recorded on that same day there was no delay whatever in recordation.

Whether the escrow was valid as an escrow is immaterial and the District Court properly concluded that it was not necessary to decide that question. The validity of the escrow would only be of consequence if there could not be a conditional delivery to the mortgagee. If there can be a conditional delivery to the mortgagee then it makes no difference whether the conditional delivery is made directly to the mortgagee or through an escrow.

Assuming, as contended for by appellant, that a chattel mortgage is a grant, nevertheless, there must be an acceptance thereof by the grantee. Acceptance is a question of intent and acceptance can be either absolute or conditional. The facts in the case indicate that appellee Bank did not intend to accept the security of the chattel mortgage until the close of escrow. Its acceptance on February 4, 1953, was therefore a conditional acceptance.

Even if Section 1056 of the California Civil Code was applicable and the delivery was deemed absolute on February 4, 1953, and even if acceptance was not conditional on that date, nevertheless, the mortgage would not be an effective mortgage capable of creating a lien until February 20, 1953, for until that time there was no obligation in existence for which the mortgage could be security. There cannot be a mortgage unless and until there is a debt or obligation which can be secured thereby. The obligation came into existence on February 20, 1953, and recordation of the mortgage prior to that time would have been ineffectual and would not have created a lien

in favor of the Bank until February 20, 1953, when the obligation arose.

The Referee's finding that the money was paid by appellee Bank to S. A. Willen Co. on February 20, 1953, is supported by substantial evidence. However, it is immaterial whether the money was actually paid by the Bank to the borrower on February 20, 1953 or February 24, 1953. Regardless of the date of its recordation, a mortgage does not become a lien and an effective mortgage until the obligation for which it is security comes into being.

In any event, assuming that there was an actual delay of 16 days in recording the Chattel Mortgage, such a delay, under the circumstances of our case, would not be so unreasonable as to render the chattel mortgage invalid. A Notice of Intended Mortgage was recorded immediately so that no secret lien was involved. Furthermore, recordation of a mortgage prior to the time that the loan was to be made would not have created a lien and therefore would have been a premature act.

I.

The Effective Delivery Date of the Chattel Mortgage Was on February 20, 1953, at the Close of the Escrow. Delivery on February 4, 1953, Was a Conditional Delivery Only.

There was no delay whatever in recording the chattel mortgage in question. The mortgage was recorded on February 20, 1953, the same day the mortgage became effective and the same day delivery of the mortgage was completed. That the mortgage was delivered on February 20, 1953, was admitted by counsel for appellant on several different occasions. [R. pp. 58, 60.]

From a legal standpoint delivery to the mortgagee was not complete until the mortgage was delivered out of the Bank's escrow department. (*Citizens National Trust and Savings Bank v. Gardner*, 161 F. 2d 530 (C. C. A. 9, 1947).) The *Citizens Bank* case, decided only recently in this very Circuit Court, is squarely in point, holding that a chattel mortgage is deemed delivered as of the close of "escrow." That case is factually identical with the case at bar. In both instances a chattel mortgage was given to secure a loan and in both instances the chattel mortgage was deposited in escrow at the lending bank.

The Referee, in his memorandum opinion, in effect admitted that the *Citizens Bank* case is factually in point, but went on to state that the question of the applicability of Section 1056 of the California Civil Code was not raised in the *Citizens Bank* case. We do not know whether the point that the escrow was opened at the lending bank

was raised in the *Citizens Bank* case in the sense that it was urged as a basis for decision.² However, regardless of whether the point was actually urged by the parties, the court was certainly cognizant of it. It was recited in the decision on at least three separate occasions and the court, therefore, was fully aware that the lending bank, through its escrow department, was also the escrow holder. In deciding the case the court said:

“The evidence, which was presented by a written stipulation, discloses that the bankrupts executed the mortgage on May 4 and deposited it in appellant’s escrow department on that date. When the escrow was closed on May 19, the escrow department delivered the mortgage to appellant as mortgagee, and appellant then had the mortgage recorded five days later on May 24.

* * * * *

“*Williams v. Belling, supra*, is authority for the proposition that any presumption that an instrument was executed *and delivered* on the date it bears may be overcome by a contrary showing (76 Cal. App. at page 615, 245 P. 455). We think it clear that until the mortgage was delivered to appellant on May 19, at the close of the escrow, it was not an effective mortgage capable of recordation.” (161 F. 2d at 533.)

The case at bar is an *a fortiori* case. In our case, unlike the *Citizens Bank* case, a notice of intended mortgage was recorded and furthermore the time intervening between delivery to the escrow department and recordation of the mortgage was 16 days instead of 20 days.

²It should be noted that appellant trustee in our case was the attorney for the trustee in the *Citizens Bank* case.

Although the *Citizens Bank* case is determinative of the question presented on this appeal, nevertheless, if the matter were to be examined as a new question the result would still be the same on several separate and distinct grounds, which will be hereinafter discussed under this Point I as well as Points II, III and IV.

A. A Chattel Mortgage Is Not a Grant. A Chattel Mortgage Is a Contract and a Contract May Be Delivered Conditionally to the Other Contracting Party to Take Effect Upon Performance of the Condition.

Except for Point IV of appellant's brief, the basis of appellant's argument, as was the entire basis of the Referee's decision, is the applicability of Section 1056 of the California Civil Code to the chattel mortgage in question. Points I, II and III of appellant's brief, in essence, present the following argument: There can be no conditional delivery of a chattel mortgage to the mortgagee. If the escrow holder is not a third person the escrow is invalid and consequently the result is a conditional delivery to the mortgagee. Under Section 1056 of the Civil Code the delivery therefore became an absolute delivery when originally made and consequently the time elapsing between the time of delivery and recordation of the mortgage was 16 days, which period constitutes an unreasonable delay in recordation.

Since appellant's argument rests upon the major premise that there can be no conditional delivery of a mortgage to the mortgagee, appellant's entire argument must necessarily fall upon a showing that the major premise is false. That this premise is false can be demonstrated clearly from the authorities which follow.

Section 1056 of the California Civil Code, which is but a codification of the common law rule in regard to conditional delivery of grants, does not apply to chattel mortgages. This section provides as follows:

“A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.”

As was stated in *Adler v. Sargent*, 109 Cal. 42, 49, 41 Pac. 799 (1895), a mortgage is not a grant. A mortgage does not fall within the definition of a grant in California Civil Code, Section 1053, which states:

“A transfer in writing is called a grant, or conveyance, or bill of sale. The term ‘grant,’ in this and the next two articles, includes all these instruments, unless it is specially applied to real property.”

Section 1039 of the Civil Code defines transfer as follows:

“Transfer is an act of the parties, or of the law, *by which the title to property is conveyed* from one living person to another.” (Emphasis added.)

It is well settled in California that a mortgage does not transfer title but merely gives a lien on the property as security for a debt. A lien is simply a charge on the property—a thing in action. (*Teater v. Good Hope Development Corp.*, 14 Cal. 2d 196, 93 P. 2d 112 (1939); *McMillan v. Richards*, 9 Cal. 365, 411 (decided in 1858 prior to the adoption of the Codes); *Johnson v. Razy*, 181 Cal. 342, 344, 184 Pac. 657 (1919); *Priddel v. Shankie*, 69 Cal. App. 2d 319, 328, 159 P. 2d 438 (1945).) That a mortgage is not a grant is further indicated by

Section 2952 of the Civil Code which provides, in part, as follows:

“Mortgages and deeds of trust of real property may be acknowledged or proved, certified and recorded, *in like manner and with like effect, as grants thereof.* . . .” (Emphasis added.)

A mortgage is a contract. (*Lederer v. Muir*, 79 Cal. App. 2d 478, 180 P. 2d 758 (1947).) A mortgage is defined in Section 2920 of the Civil Code as “a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.” In their note to this section (2 Civ. Code Ann. (1872) 270-271), the following comment as to the purpose of the section is made by the Code Commissioners:

“At common law a mortgage was a conveyance of property. . . . The definition of the text is new. It is designed to make a clear distinction between a pledge and a mortgage, and at the same time *to avoid the idea of a mortgage being in any sense a transfer.* ‘Hypothecation’ is the proper word for this purpose. . . .” (Emphasis added.)

Furthermore, Section 2888 of the Civil Code provides:

“Notwithstanding an agreement to the contrary, *a lien, or a contract for a lien, transfers no title* to the property subject to the lien.” (Emphasis added.)

The rule set forth in Section 1056 of the California Civil Code is not applicable to instruments contractual in nature. Even as to grants the rule has been criticized as arbitrary and without justification. Professor Wigmore states that the rule applies to deeds but that “it has therefore long been well understood, for other writings,

that the finality of the writing as a final act depends upon the circumstances of each case; that it may be left to depend on a third person's assent or upon any other precedent condition; and, in particular, that this is so whether the writing (or escrow) is provisionally handed to the grantee himself or to anyone else." (9 Wigmore, Evidence [3rd ed. 1940], Sec. 2410, p. 30.)

Likewise Restatement of Contracts, Section 241, provides:

"Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith."

Although there is some early dictum to the contrary, nevertheless, the proposition that there can be a conditional delivery of a contract to the other contracting party is well established and recognized in California in a number of cases.

Spade v. Cossett, 110 Cal. App. 2d 782, 243 P. 2d 799 (1952);

Gleeson v. Dunn, 113 Cal. App. 347, 298 Pac. 119 (1931);

Severance v. Knight-Counihan Co., 29 Cal. 2d 561 177 P. 2d 4 (1947);

Verzan v. McGregor, 23 Cal. 339 (1863).

See dictum *contra* in

California Raisin Growers v. Abbott, 160 Cal. 601, 117 Pac. 767 (1911).

Other California cases have recognized the rule that contractual instruments may be delivered conditionally but found the rule inapplicable to the specific cases involved because the condition was contrary to the written terms of the contract.

Hanrahan-Wilcox Corp. v. Jenison Machinery Co.,
23 Cal. App. 2d 642, 73 P. 2d 1241 (1937);

L. B. Williams Organization, Inc. v. Winter, 106
Cal. App. 2d 604, 235 P. 2d 407 (1951).

In *Spade v. Cossett*, *supra*, defendant signed a written deposit receipt agreement to sell certain property and to pay plaintiff's commission. Defendant handed the writing to plaintiff upon the agreement that plaintiff was not to deliver it to the buyer and that it was to terminate if defendant's husband would not agree to the terms. Defendant's husband did not agree but plaintiff sued for his commission. The court held that the contract between plaintiff and defendant was not binding until the condition upon which delivery was dependent was satisfied, quoting with approval the following language from *Burke v. Dulaney*, 153 U. S. 228, 38 L. Ed. 698 (1894).

“‘A written contract must be in force as a binding obligation to make it subject to this [parol evidence] rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.’”
(*Spade v. Cossett*, 110 Cal. App. 2d at 784.)

It is significant that all but one of the California cases cited above were decided while Sections 1056 and 1627 of the Civil Code were in effect. Both these sections, it

should be noted, were enacted in 1872 as part of the original codification of California law. Section 1627 of the Civil Code contains the general statement that "The provisions of the chapter on transfers in general, concerning the delivery of grants, absolute and conditional, apply to all written contracts." In spite of this section the California cases, heretofore cited, hold that there can be a conditional delivery of contracts to the other contracting party. The reason must be that Section 1627, which uses rather general language, was not intended to change the then existing law and incorporate the rule of 1056. This would be a natural explanation for otherwise California would be contrary to the overwhelming authority in other jurisdictions. (Among the leading cases in other jurisdictions, see, *Ware v. Allen*, 128 U. S. 590, 32 L. Ed. 563 (1888); and *McClintock v. Ayers*, 36 Wyo. 132, 253 Pac. 658 (1927).)

There is nothing in the case of *Rockefeller v. Smith*, 104 Cal. App. 544, 286 Pac. 487 (1930), relied upon by appellant which is contrary to anything which has been stated hereinabove. Although that case cites a number of Code sections relied upon by appellant, except for one or two Code sections dealing with the general requirement of delivery, none of the Code sections quoted had any bearing on the case. That case merely held that delivery is necessary to make a document operative.

One further point on the question of delivery should be mentioned briefly. Appellant states that there was either an absolute delivery on February 4, 1953, when the escrow was opened or that there was no delivery at all. This argument begs the entire question and completely disregards the third possibility, namely, a conditional

delivery to take full effect in the future upon the performance of a condition. That there can be such a conditional delivery has, we believe, been sufficiently demonstrated.

B. Since There Can Be a Conditional Delivery of a Chattel Mortgage, It Is Immaterial Whether the Escrow Was a Valid Escrow.

In addition to what has been stated in Point I-A above, as is pointed out by a number of the authorities cited by the appellant himself in his opening brief, as well as in his memorandum filed in the District Court, an escrow is but a conditional delivery. (*E.g.*, Cal. Civ. Code, Sec. 1057; 19 Am. Jur. 432; *Lechner v. Halling*, 35 Wash. 2d 903, 216 P. 2d 179, 185 (1950).) The concept of an escrow originated in the law pertaining to deeds and was used as a means of getting around the common law rule set forth in Civil Code Section 1056 that there can be no conditional delivery of a *grant* to the grantee. (18 Cal. Jur. 2d 304.) In fact the California Civil Code section dealing with escrows immediately follows the section which states that there can be no conditional delivery of a grant to the grantee (Cal. Civ. Code, Sec. 1057). Section 1057 of the Civil Code merely states that a grant may be deposited by the grantor with a third person to be delivered by such third person upon the performance of certain conditions and that while in the possession of such third person and subject to the condition it is called an escrow. All Section 1057 states is that a conditional delivery of a grant when it is made to a third person is an escrow. Neither this section, nor the cases stating that there is no escrow unless delivery be to a third person, answer the question as regards delivery to the other party to a transaction. Where a conditional

delivery has been made to the party himself, it may not be an escrow but, nevertheless, it is still a conditional delivery.

Therefore, where the rule of Section 1056 does not apply, it makes no difference how a conditional delivery is handled. In such instance there can be a delivery either to a third person or to the other party to the transaction. That the practice has arisen to use escrows as a convenient method of handling conditional deliveries in situations where an escrow is not legally necessary does not change the rule of law as to when a conditional delivery to the other party may be made. The third party requirement is only significant where it is the only way in which a conditional delivery can be effected. This is borne out by the very authorities cited by appellant for the proposition that the escrow holder must be a stranger to the transaction. For example, on page 8 of appellant's brief, there is a statement from 18 Cal. Jur. 2d 324 to the effect that an escrow holder must be a stranger to the transaction which is the subject matter of the escrow. This statement is, of course, only part of a sentence appearing on page 324. The rest of the sentence goes on to state the reason therefor, namely, ". . . since the ancient rule that delivery of the deed to the grantee as an escrow is to be taken as an absolute delivery is incorporated in the Civil Code." The same is true of appellant's quotation from a section in American Jurisprudence dealing with the general subject matter of who may act as escrow holders. (App. Op. Br. p. 8.) The very next paragraph to that from which the trustee quotes clearly shows the connection between an escrow and a conditional delivery of a grant. The text further goes on to indicate in the very same section that the rule

involving conditional delivery of grants was not applicable to other instruments. (19 Am. Jur. 432.)

The District Court correctly held that it was not necessary in this case to pass upon the question of validity of the escrow. The crucial question is whether there can be a conditional delivery of a chattel mortgage to the mortgagee. Even if we assume that no escrow was created, we still had a conditional delivery, and upon performance of the conditions, an effective mortgage.

II.

The Chattel Mortgage Could Not and Did Not Become an Effective and Binding Chattel Mortgage Until February 20, 1953, for Until That Time There Was No Obligation in Existence for Which the Mortgage Could Be Security.

A. Recordation of the Mortgage Prior to February 20, 1953, Would Have Been Ineffective and Would Not Have Created Any Lien in Favor of the Bank.

If it be assumed, contrary to the authorities cited under Point I above, that a chattel mortgage is a grant and falls within Section 1056 of the Civil Code, the decision of the District Court would still be correct. It is well established that there cannot be a mortgage unless and until there is a debt or obligation which can be secured thereby. (*Coon v. Shry*, 209 Cal. 612, 289 Pac. 815 (1930); *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482 (1895); *Turner v. Gosden*, 121 Cal. App. 20, 8 P. 2d 505 (1932).) Although a document denominated a chattel mortgage was signed and deposited in escrow on February 4, 1953, it is clear from the cases cited that the document did not become in law an effective and operative mortgage until a debt existed.

Recordation of the "chattel mortgage" on February 4, 1953 would have been totally ineffective and no lien would or could have arisen until the debt arose on February 20, 1953 at the close of "escrow." (*Western Loan & Building Co. v. Scheib*, 218 Cal. 386, 23 P. 2d 745 (1933).)

In *Western Loan & Building Co. v. Scheib*, *supra*, plaintiff agreed to make a loan to defendant upon receipt of a promissory note and mortgage executed by defendant. Defendant executed the instruments and on April 8, 1927 his agent had the mortgage recorded and then delivered the mortgage (but not the note) to plaintiff. Certain mechanics' liens attached on April 13, 1927. Thereafter, on May 27, 1927 the note was delivered to plaintiff. Subsequent to the receipt of the note plaintiff advanced the money. In holding that plaintiff's mortgage was subsequent to the mechanics' liens, the court reasoned as follows:

"A mortgage is merely security for a debt and if there is no debt there is no mortgage. (17 Cal. Jur. sec. 17, p. 710; sec. 161, p. 873.) Since the debt did not come into existence until May 27, 1927, the mortgage as a lien came into existence at that time." (*Western Loan & Building Co. v. Scheib*, 218 Cal. at 393.)

The court stated that no debt arose until May 27, 1927, because it was not until then, when the note was delivered, that defendant performed all the conditions and plaintiff became obligated to make the loan.

So in the instant case it was not until the close of escrow on the 20th day of February that there was complete performance of all the conditions thereby obli-

gating the Bank to make the loan. Moreover, the debt for which the mortgage became security, namely, the promissory note, was dependent for its efficacy on a condition precedent. The note was delivered in escrow conditionally and it was not to become effective until the Bank loaned the money. The money was not to be loaned and actually was not loaned until February 20, 1953. [Findings IV and VI, R. pp. 26-27.]

Whatever question there may be as to the effectiveness of a conditional delivery with respect to other instruments, there can be no question as to promissory notes. Section 16 of the Uniform Negotiable Instruments Law, adopted in California and set forth in Section 3097 of the Civil Code, expressly provides that "the delivery [of a negotiable instrument] may be shown to have been conditional." The courts in California have ruled accordingly that there can be a conditional delivery of a promissory note, and that until the condition is fulfilled there is no binding obligation. (*Harper v. French*, 29 Cal. App. 2d 214; 84 P. 2d 216 (1938); *Silva v. Gordo*, 65 Cal. App. 486, 224 Pac. 757 (1924).) Section 3097 of the Civil Code did not change the law in this regard. It has always been the rule in California, even prior to the adoption of the Uniform Negotiable Instruments Law, that a promissory note could be delivered conditionally to the payee. (*Billings v. Everett*, 52 Cal. 661; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638 (1894).) This, of course, is but an application of the general rule that contractual instruments can be delivered conditionally to the other contracting party. (See cases cited under Point I-A. See, also, *Burke v. Dulaney*, 153 U. S. 228, 38 L. Ed. 698 (1894).)

Authorities in other jurisdictions are in accord with the California cases regarding conditional delivery of promissory notes.

Ware v. Allen, 128 U. S. 590, 595, 32 L. Ed. 563 (1888);

Hogue v. McClain County Natl. Bank, 173 Okla. 122, 47 P. 2d 575, 578 (1935);

Gamble v. Riley, 39 Okla. 363, 135 Pac. 390, 392 (1913);

Alexander v. Kerhulas, 151 S. C. 354, 149 S. E. 12, 13 (1929) (concurring opinion);

Interstate Electric Co. v. Russell, 242 Ala. 233, 5 So. 2d 484 (1942).

Upon the compelling authority of the foregoing cases, it seems clear that there was no debt and no valid promissory note in the instant case until the end of "escrow," at which time the conditions upon which delivery was made to depend were fulfilled and at which time the Bank became obligated to make the loan. This being so, it would seem that only then did the chattel mortgage become effective as a mortgage. It is, therefore, reasonable to conclude that the requirement of recordation of California Civil Code Section 2957 became applicable only on February 20th.

B. Whether the Money Was Actually Paid on February 20, 1953, or on February 24, 1953, Is Immaterial Insofar as the Validity and Effectiveness of the Lien of the Chattel Mortgage Is Concerned.

The Referee found that the proceeds of the loan were paid by appellee Bank to S. A. Willen Co. on February 20, 1953. [Finding VI, R. p. 27.] This finding, as will hereinafter be shown, is supported by substantial evi-

dence. However, appellant challenges this finding and does so for the first time in his opening brief before this Court. It is perhaps significant that appellant trustee had heretofore not questioned the aforesaid finding made by the Referee. Although appellee Bank devoted a substantial portion of its brief before the District Court to the proposition discussed hereinabove under Point II-A, and on several occasions, both in its statement of the facts and in its argument, referred to the fact that the loan was made on February 20, 1953, appellant trustee made no reply thereto nor did he take any issue with the statements of fact contained therein. The record before the District Court is the identical record which is now before this Court, except, of course, for the District Court's memorandum opinion and the notice of appeal. [R. pp. 37, 71-73.]

First: The finding as to when the money was paid is supported by substantial evidence in the record and appellant's statement that the record shows that the money was paid to S. A. Willen Co. on February 24, 1953 rather than February 20, 1953 completely disregards evidence in the record to the contrary.

It is well-established law that evidence of an intent or design to do an act is in and of itself substantial proof that the act was done.

Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. Ed. 706 (1892);

People v. Alcalde, 24 Cal. 2d 177, 148 P. 2d 627 (1944);

Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919);

Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313 (1910);

Benjamin v. District Grand Lodge, 171 Cal. 260,
152 Pac. 731 (1915);

People v. Tugwell, 28 Cal. App. 348, 152 Pac.
740 (1915);

1 Wigmore on Evidence, Sec. 102, p. 534, and
Sec. 104.

The notice of intended mortgage [Appellee's Ex. 4] clearly indicates an intent that the consideration be paid on February 20, 1953.

Aside from the notice of intention there is yet another significant item of evidence which supports the Referee's finding. The original promissory note [Appellee's Ex. 2] contains a statement on the reverse side thereof, "Interest adjusted through Escrow No. 24099-2C to 2-20-53" and this statement is signed "Union Bank & Trust Co. of Los Angeles, by John E. Cathey." The clear implication from this statement is that an adjustment in interest was made so that interest ran only from the date that the loan was actually made. Even if another inference from the quoted statement may reasonably be drawn, nevertheless, where more than one inference may be drawn from the evidence, the conclusion reached by the trier of fact may not be disturbed on appeal. Appellee is entitled to have the evidence construed most favorably to it and is entitled to the full effect of every legitimate inference therefrom.

Tennant v. Peoria & Pekin Union R. Co., 321
U. S. 29, 35, 88 L. Ed. 520, 525 (1943);

United States v. Ingalls, 114 F. 2d 839, 842, (App.
D. C., 1940);

Helvering v. Johnson, 104 F. 2d 140, 144 (8th
Cir., 1939);

Dowell, Inc. v. Jowers, 182 F. 2d 576, 579 (5th
Cir., 1950).

Appellant seizes upon one bit of evidence, the statement on the ledger sheet [Appellee's Ex. 5] reading "Date Advanced 2/24/53," which statement unfortunately was never explained through testimony, and relies upon this unexplained statement for the proposition that the money was paid on February 24th, completely disregarding other evidence which supports the finding.

Second: Assuming, however, that the money was paid not on February 20th as found by the Referee, but on February 24th as contended by the appellant, this would have no bearing upon the case and the result would still be the same. As was pointed out in *Western Loan & Building Co. v. Scheib*, 218 Cal. 386, 23 P. 2d 745 (Point II-A above), a mortgage which is recorded prior to the obligation coming into existence becomes effective as a mortgage and a lien on the date the obligation for which it is security comes into being. Although a mortgage recorded prior to the obligation coming into being does not create a lien, nevertheless, it need not be re-recorded when the obligation does come into being and the mortgage takes effect as of the date of the obligation. Furthermore, as is indicated in the cited case, the mortgage becomes effective upon the date the lender is obligated to pay the money. The Bank was not obligated to make the loan until February 20, 1953.

Third: Aside from anything else which has been stated heretofore, the discrepancy between the date of payment and the date of recording is not as great as it might at first blush appear. Assuming the money was paid on February 24th, this was only the next business day following the date upon which the mortgage was recorded. An examination of the mortgage and the

recording data contained thereon [Appellee's Ex. 1] further indicates that the time differential may be only a few minutes. The mortgage was recorded at the County Recorder's office on February 20, 1953 at 2:46 P.M., only 14 minutes before the close of the banking business day. This court can take judicial notice of the fact that February 20, 1953 was a Friday and that the next ensuing banking business day was February 24, 1953. February 22, 1953, Washington's birthday, having fallen on a Sunday, Monday, February 23rd, was a legal holiday. (*Delaware L. & W. R. Co. v. Koske*, 279 U. S. 7, 12, 73 L. Ed. 578, 582 (1929); *Shannon v. United States*, 206 F. 2d 479, 481 (1953); *Shade v. Shade*, 252 Ala. 134, 39 So. 2d 785 (1949); *People v. Cunningham*, 99 Cal. App. 2d 296, 300, 221 P. 2d 283, 286 (1950).)

III.

The Chattel Mortgage Did Not Become an Effective Chattel Mortgage Until It Was Accepted by the Bank.

Aside from what has been said hereinabove concerning a mortgage not becoming effective until there is a debt to secure, there is yet another reason why the chattel mortgage in question did not become effective as such until February 20, 1953. Assuming, as contended by appellant, that a chattel mortgage is a grant, nevertheless, such grant must be accepted by the grantee before it becomes effective. That acceptance is frequently presumed does not derogate from the requirement that there be an acceptance.

Reina v. Erassarret, 90 Cal. App. 2d 418, 203 P. 2d 72 (1949);

Kelly v. Bank of America, 112 Cal. App. 2d 388, 246 P. 2d 92 (1952).

In *Kelly v. Bank of America, supra*, the court stated that we must consider not only the grantor's intent but also whether the deed was delivered to and accepted by the grantee as an unequivocal transfer of title to him. The court went on to quote with approval the following language from *Reina v. Erassarret, supra*:

““Delivery” is a word of well-defined meaning in law. The elements are that the writing must be meant by the maker to take immediate effect and be presumably or in fact, accepted by the other party. The delivery and acceptance are of necessity simultaneous and correlative acts. The law does not force a man to take title to real property against his will. (*Hibberd v. Smith*, 67 Cal. 547 [4 P. 473, 8 P. 46, 56 Am. St. Rep. 726].) Hence, the assent of the grantee is necessary in order to make a delivery effective and the deed operative as such.” (112 Cal. App. 2d at 398.)

Acceptance by its very nature is a question of intent. The facts in the instant case indicate that the Bank did not intend to accept the security of the chattel mortgage until the close of escrow. A “Notice of Intended Mortgage” was required and the notice recited that the mortgage would be delivered and the consideration therefor paid on February 20, 1953. The Bank imposed certain conditions and certainly the Bank would not have wanted to accept the security until the conditions had been fulfilled.

In *Imes v. MacDonald*, 113 Cal. App. 427, 298 Pac. 173 (1931), it was held that when plaintiff received the deed from the escrow before the escrow holder obtained a certificate of title, plaintiff's receipt of the deed was a mere “conditional acceptance,” which was defined as “where the purchaser at the time of the execution and

delivery of the contract receives a deed not with the intention of having title vest at that time, but with the intention of retaining the deed and having title vest if the abstract of title shows a merchantable title.” (113 Cal. App. at p. 433.)

Therefore, whether the mortgagee Bank did not accept until the end of escrow, or accepted at the beginning, but conditionally, it may be argued persuasively that the mortgage lacked legal efficacy until the end of escrow.

IV.

**Even if the Chattel Mortgage Had Been Legally
Delivered and Accepted on February 4, 1953,
Nevertheless, There Was No Unreasonable Delay
Under the Circumstances of This Case.**

Assuming effective delivery took place on opening of escrow, recordation at close of escrow did not constitute an unreasonable delay. Section 2957 of the California Civil Code, as construed in the early case of *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911 (1899), requires that a chattel mortgage be recorded promptly. However, whether in a particular instance a chattel mortgage has or has not been recorded promptly depends upon the circumstances of the particular case. (*In re Henningsen* (D. C., N. Y.), 291 Fed. 684, aff'd in 297 Fed. 821; *In re Mercury Engineering, Inc.*, 68 Fed. Supp. 376 (D. C. Cal., 1946); *Citizens National Trust and Savings Bank v. Gardner*, 161 F. 2d 530 (C. C. A. 9).) The fact that in *Williams v. Belling*, 76 Cal. App. 610, 245 Pac. 455, a 14-day delay was deemed to be unreasonable does not mean that a delay of 16 days in the instant case is unreasonable. In the case of *In re Mercury Engi-*

neeging, Inc., 68 Fed. Supp. 376 (D. C. Cal., 1946), the court said, in reference to Civil Code Section 2957:

“Because the requirement as to recording takes the place of immediate delivery and change of possession required in other cases (Cal. Civ. Code Sec. 3440) the courts have held that this requirement is satisfied only if the recording is done promptly, *unless such recording is impractical or the circumstances of the case warrant delay.*” (Emphasis added.)

In the *Mercury Engineering* case, the requirement of Section 2957 was satisfied by a recordation which took place 26 days after execution. The mortgage was apparently executed on June 30, 1943, by a trustee for a corporation which was then in the process of formation. The company was formed on July 6th and thereafter the trustee transferred the property described in the mortgage to the new corporation. The corporation completed its organization and began business on the week ending July 24th. (The opinion, apparently in error, recites Saturday, July 4th, which was not a Saturday.) The mortgage was recorded on July 26th. The court stated, at page 380:

“Of course, it could have been recorded before the corporation was organized. But I doubt if any lawyer of experience, especially one experienced in corporate organization, would have advised Mr. Barili to do this. . . .

“We need not discuss the potential liability or claims of liability which such a situation might have engendered. Suffice it to say that the organization of a corporation being a condition precedent to the effectiveness of the chattel mortgage, good business sense and sound legal principles called for delay until organization was achieved.”

Appellant seeks to distinguish the *Mercury Engineering* and the *Citizens National Bank* cases on the ground that they involved purchase money mortgages and seeks to convey the impression that Section 2957 of the California Civil Code has no application to purchase money chattel mortgages. The distinction which appellant seeks to make of these cases is non-existent and the language quoted from the two cases on pages 23 and 24 of appellant's brief is highly misleading as quoted.

That appellant's purported distinction is without foundation is apparent from a most cursory reading of those cases. In the *Mercury Engineering* case the validity of the chattel mortgage was challenged on two separate grounds; first, that there had been no compliance with Section 3440 of the California Civil Code in that no notice of intention to mortgage was published and recorded, and second, that there was no compliance with Section 2957 of the California Civil Code in that the chattel mortgage had not been recorded promptly. The court first held in that case that no notice of intention to mortgage was necessary in that Section 3440 did not apply to purchase money mortgages. The court then went on to decide the second issue in the case and held that under the circumstances of that case the delay in recordation of 26 days was not unreasonable and did not render the chattel mortgage void under Section 2957 of the California Civil Code.

Appellant's quote from the *Mercury Engineering* case, appearing on page 23 of his brief, is particularly misleading. Appellant purports to supply a Code section which is not expressly mentioned in the quoted language. In doing so, appellant supplies Section 2957 of the California Civil Code, whereas the provision referred to in

the quoted language was Section 3440 of the Civil Code. Not only is this eminently clear from a reading of the previous paragraph to that quoted, but a footnote in the opinion to the very language quoted by appellant places that question beyond any shadow of doubt. The footnote cites the Second Circuit case referred to in the language quoted in the brief and an examination of that case reveals that it dealt solely with the New York counterpart of Section 3440 of the Civil Code of California.

What has been said in regard to the *Mercury Engineering* case is equally applicable to the *Citizens Bank* case. In that case, as in the *Mercury Engineering* case, the court expressly stated that the trustee was seeking to declare the chattel mortgage void as against him “on the grounds [1] that the notice of intention to chattel mortgage the property, required by §3440 California Civil Code, was never published; [2] that appellant had failed to record a copy of the mortgage within a reasonable time after its execution, as required by §2957 California Civil Code; and [3] that a certified copy of the mortgage was not promptly deposited with the Department of Motor Vehicles, in compliance with §195 of the California Vehicle Code.” (161 F. 2d at 532.) The court, in the *Citizens Bank* case, first decided that Section 3440 did not apply and then went on to decide as discussed under Point I hereinabove that the mortgage was delivered as of the close of escrow and that since the mortgage was delivered within five days thereafter there was no unreasonable delay in recordation.

Appellant’s further statement that because the *Mercury Engineering* and *Citizens Bank* cases involved a purchase money mortgage intervening creditors’ rights were not

affected is not only irrelevant but fallacious as well. It is irrelevant because, as appellant himself points out on page 22 of his brief, a chattel mortgage which has not been properly recorded is invalid as to antecedent or existing creditors as well as intervening creditors. (*Noyes v. Bank of Italy*, 206 Cal. 266, 272, 274 Pac. 68, 71 (1929).)³ It is fallacious in that there can be intervening creditors in a purchase money mortgage as well as in any other mortgage. If recording is delayed, creditors can come into existence during the period between execution and delivery of the purchase money mortgage and its recordation. The *Mercury Engineering* and *Citizens Bank* decisions do not state whether intervening creditors, antecedent creditors, or both, were involved. Certainly there must have been some creditors, otherwise there would be no basis for the contention by the trustee in bankruptcy in each of the cases as to invalidity of the mortgages under Section 2957 of the California Civil Code.

In the case of *In re Henningsen*, 291 Fed. 684, aff'd in 297 Fed. 821, the court held that a delay of 50 days (May 24th to July 13th) was justified and reasonable where the delay was due to a search which was made to determine whether there were any additional liens on the mortgaged property.

With respect to the instant case, it has been shown hereinabove (Point II) that the chattel mortgage was ineffective until February 20th, for until that time there

³Since an improperly recorded mortgage is equally invalid as to existing creditors, appellant's attempted distinction of *Summerville v. Kelliher*, 144 Cal. 155, 77 Pac. 889 (1904), in which a 15-day delay was held not to invalidate a mortgage, is not sound.

existed no debt which it could secure. Therefore, as in the *Mercury Engineering* case, an experienced lawyer, pursuant to "good business sense and sound legal principles," could reasonably have advised a delay in recordation until February 20th. A sooner recordation would not have established the priority of the mortgage until February 20th. (*Western Loan & Building Co. v. Schieb*, 218 Cal. 386, 23 P. 2d 745 (1933).) Therefore, the reason for prompt recordation set forth in *Williams v. Belling*, 76 Cal. App. 610, 245 Pac. 455 (1926), namely, "in order to give notice to and bind third parties," does not exist in the instant case. Furthermore, the "manifest policy" of Section 2957 and similar sections enunciated in *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911 (1899), is inapplicable to the facts of the present case. That court stated: "The very object of them all, the reason for their being, is to prevent secret liens upon and interests in personal property." There was no lien in the instant case until February 20th, and the recorded and published notice of intended mortgage eliminated any element of secrecy.

Assuming again, for the sake of discussion, that the chattel mortgage was legally delivered and became effective on February 4th, there is still another factor in this case which would render a delay in recordation of 16 days reasonable.

As part of the loan transaction, the mortgagor executed a "Notice of Intended Mortgage," which the Bank recorded the next day, February 5, 1953. The Referee in his memorandum states that "The nature of the bankrupt's business did not require compliance with section 3440.1 [Cal. Civ. Code]." Yet the Referee found that

the mortgagor was not only a manufacturer but also a jobber of cotton products. Section 3440.1 of the California Civil Code is applicable to a "mortgage of the fixtures or store equipment of a . . . retail or wholesale merchant."

A jobber is a wholesale merchant, a particular type of wholesale merchant. The test of a wholesaler generally is whether he sells to those who sell again.

Zehring v. Brown Materials, 48 Fed. Supp. 740 (D. C., Cal. 1943);

Harris v. Hammond, 51 Fed. Supp. 91 (D. C., Ga. 1943);

Haynie v. Hogue Lumber & Supply Co., 96 Fed. Supp. 214, 216 (D. C., Miss. 1951);

Guess v. Montague, 51 Fed. Supp. 61 (D. C., S. C. 1942).

A jobber falls squarely within the test for a wholesaler. Both are middlemen. Webster's New International Dictionary, 2nd ed., defines a jobber as "one who buys goods from importers or producers and sells to other dealers; a middleman." Furthermore, it is arguable that "retailer" and "wholesaler," which are often defined by distinguishing one from the other, were intended in Section 3440.1 to be collectively exhaustive and cover the whole field of distribution of goods. This is borne out by the purpose of this section, which applies equally to a jobber as to any other merchant. In the *Mercury Engineering* case, *supra*, the court stated that the object of the statute "is to protect the creditors against a surreptitious sale or incumbrance of the chief assets or equipment of a trader." (68 Fed. Supp. at 379.)

However, whether the chattel mortgage in question does or does not fall within Section 3440.1 is not important in this case. What is important is that a lender who insists on security should not be forced to make a binding and conclusive determination whether any of the items in the mortgage are the fixtures or equipment of a wholesale merchant so as to make Section 3440.1 applicable. In the instant case there was no delay beyond the time necessary to make the notice of intended mortgage effective. The Bank acted in good faith. [R. p. 64.] Certainly a bank loaning money should be able to protect itself against a possible later contention that the mortgage was void for failure to first record a notice. Proof that such later contentions have been made is found in the many cases which deal with the applicability of Section 3440.1. We need only look at the *Mercury Engineering* and *Citizens Bank* cases, where the trustee in bankruptcy claimed that a chattel mortgage fell within Section 3440 [now 3440.1] and therefore was invalid because no notice of intended mortgage had been recorded.

If a delay long enough only to record a notice and wait the requisite 10 days thereafter constitutes an unreasonable delay where it is subsequently determined that the notice was unnecessary, it would mean that even the most careful and prudent lender would never know whether he actually received the security for which he bargained. If the lender does not record a notice of intended mortgage and it is later determined that he should have done so, his mortgage is invalid. On the other hand if he plays safe and files a notice of intended mortgage and it is subsequently claimed and determined that such notice was not necessary in his particular case then, according to the Referee's ruling and appellant's con-

tention, the lender has been guilty of undue delay in spite of the fact that he has recorded a notice of which any creditor making a title search would have knowledge. Such is not and cannot be the law as to what constitutes unreasonable delay in recording a chattel mortgage.

Conclusion.

The parties to the mortgage and loan transaction clearly intended that the mortgage be delivered and that it take effect on February 20, 1953. Unless there is some public policy or rule of law precluding its accomplishment, effect should be given to the intention of the parties. It has been shown in this brief that there is no public policy or rule of law which would prevent giving effect to the intention of the parties. On the contrary we believe the law compels a holding that the chattel mortgage was valid and enforceable against the mortgagee's creditors as well as the trustee in bankruptcy. Since a summary of the argument is contained elsewhere in this brief, it need not be repeated in this concluding paragraph. Suffice it to say that we believe the District Court's decision is in all respects correct and should therefore be affirmed.

Respectfully submitted,

ALFRED I. ROTHMAN,
Attorney for Appellee.

LOEB AND LOEB,
Of Counsel.

No. 15038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy of Estate
of S. A. Willen Company, a corporation, bankrupt,

Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,

Appellee.

APPELLANT'S REPLY BRIEF.

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UNION BANK & TRUST CO. OF LOS ANGELES,
Appellee.

APPELLANT'S REPLY BRIEF.

I.

**Appellee's Contention That the Validity of the Escrow
Was Not Material to a Determination of the
Validity of the Chattel Mortgage Herein Is Un-
sound.**

Under Points I and II of his Opening Brief, Appellant maintained that Appellee Bank, being a party (and not a stranger) to the transaction involved herein, could not at the same time, lawfully act as escrow holder; that, accordingly, the purported escrow was invalid; that, in the absence of a valid escrow, delivery of the chattel mortgage and note was therefore made directly to the Bank in its capacity as mortgagee-escrow holder and became absolute and effective on February 4, 1953; or, alternatively, no delivery occurred at all, and thus the mortgage never became effective (Br. pp. 7-16, incl.). Answering

these contentions, Appellee maintains that it is of no consequence whether the escrow was valid or not, since a *conditional* delivery may be made directly by the mortgagor to the mortgagee without benefit of escrow (App. Br. pp. 3-15, incl.). With this position we cannot agree.

While Appellee dismisses the question of the validity of the escrow as being of "no consequence", he at the same time tacitly assumes a contrary or inconsistent position when he argues, on page 5 of his Brief, that "From a legal standpoint delivery to the mortgagee was not complete *until the mortgage was delivered out of the Bank's escrow department.*" (Emphasis supplied.) It is obvious from this statement by Appellee that he assumes a *valid* escrow to begin with, for he cannot logically predicate a *valid* delivery on an *invalid* escrow! Yet Appellee nowhere in his Brief meets the challenge of Appellant that the escrow herein "created" was invalid. Moreover, it is obvious that despite Appellee's disclaimer, he does regard the escrow as a valid one. In support of his position, he cites the case of *Citizens National Trust & Savings Bank v. Gardner*, 161 F. 2d 530 (C. C. A. 9, 1947), and argues that while he does not know if the Court in that case was called upon to determine the question whether or not the lending bank therein could at the same time act as escrow holder, the Court was certainly aware of the situation and (presumably) put the stamp of approval thereon. It is significant that Appellee does not maintain that the question of the right of the bank to act in the dual capacity of mortgagee and escrow holder was raised in the "*Citizens Bank case*". The simple fact is that it was neither raised nor decided therein. That case is therefore of no assistance to the Court in the case at bar in determining the question. Accordingly, Appel-

lant submits that Appellee cannot “blow hot and cold” by contending at one and the same time that the validity of the escrow is of no consequence and yet assume its very validity as the foundation of his argument that the delivery of the instruments in question was not “complete” until the close of such escrow. The rule is too well established to need further authority than that already cited in Appellant’s Opening Brief, that one who is a party to a transaction cannot at one and the same time act as escrow holder; and we are aware of no authority which excepts banks from this rule.

Appellant contends, further, that a chattel mortgage is not a grant or a transfer but a contract; and that a contract may be delivered conditionally (see Appellee’s Summary, page 2, and Argument, pages 7-13, inclusive), and cites a number of authorities in the erroneous belief that these sustain him.

Appellant agrees that a chattel mortgage is a contract, but it does not follow therefrom that it is not also a grant or transfer. The term “contract” on the one hand, and the terms “grant” and “transfer” on the other hand are not, as Appellee seems to assume, mutually exclusive. It is true, of course, that a chattel mortgage (or any other kind of mortgage) does not transfer the *title* to the mortgaged property. However, this does not mean that a lien may not be effected by a transfer in writing. In his discussion of the term “grant” (which is discussed below) the Referee subscribed to this view. To quote from his memorandum [R. p. 22]:

“I am aware of the term ‘grant’ in Sec. 1053, Civil Code. I conclude that chattel mortgages, which transfer in writing liens on personal property, come within this definition. *Rockefeller v. Smith*, 104 Cal. App. 544.”

Equally specious, we believe, is Appellee's contention that a chattel mortgage is not a grant. Appellee cites *Adler v. Sargent*, 109 Cal. 42, 49, 41 Pac. 799 (1895), in support of his contention, but that case does not so hold; nor does Appellee cite any other authority to this effect. On page 9 of his Brief Appellee makes the arbitrary statement that Section 1056 of the California Civil Code relied upon by Appellant, and which provides that a grant cannot be delivered to the grantee conditionally, is not applicable to instruments "contractual in nature", but cites no competent authority to this effect. Moreover, no authority is cited by him to the effect that Section 1056 aforesaid is inapplicable to chattel mortgages. Section 1053 of said Code, cited in *Rockefeller v. Smith*, 104 Cal. App. 544, makes it abundantly clear that the term "grant" includes all instruments in writing enumerated in said Articles unless specially applied to real property (which exception is not involved in the instant situation). It is apparent that in placing a narrow or technical construction on the term "grant" Appellee is here attempting, unsuccessfully we think, to avoid the import and effect of said Section 1056, that a "grant cannot be delivered to the grantee unconditionally". The fundamental fallacy of Appellee's entire argument in this connection lies in the conclusion drawn by him that since written contracts generally may be delivered conditionally and a chattel mortgage is a contract, it too may therefore be delivered conditionally, *without taking into account any modification or exception to this rule, such as is laid down in Section 1056*. It is one thing to announce a rule. It is quite another to observe its limitations. We respectfully submit that Appellee has failed to observe them in this case.

No valid escrow having been created, and delivery of the executed chattel mortgage and note having been made on February 4, 1953, such delivery as previously argued placed the instruments in question beyond the mortgagor's power of recall, and therefore became absolute on that date.

This being true, it follows that acceptance of the chattel mortgage and note likewise became effective on that date.

II.

Appellee's Contention That There Was No Unreasonable Delay Between the Delivery and the Recordation of the Chattel Mortgage Lacks Merit.

Appellee further maintains that a delay of sixteen days (from February 4 to February 20, 1953) between the date of the delivery of the chattel mortgage and date of its recordation was not unreasonable and did not adversely affect creditors (App. Br. pp. 24-32). Whether a delay is or is not unreasonable depends on the circumstances of each particular case. As to the requirements of the California law that a chattel mortgage should be recorded promptly, if not on the date of execution and delivery, then as near to such date as possible, there can be no question. In the instant case, as pointed out in our Opening Brief (p. 3), creditors of Willen existed before February 4, 1953 and they continued to be creditors at the time of the bankruptcy. In view of this situation we believe that the Referee correctly ruled that the delay of sixteen days in the recordation of the chattel mortgage was invalid as to these creditors as well as to the Trustee in Bankruptcy. To have ruled otherwise would have sanctioned the creation of a secret lien which it is the purpose of the statute to prevent. Accordingly we are

unable to concur in the view of Appellee that the delay herein was inconsequential or reasonable.

As for the Notice of Intended Mortgage upon which Appellee places great reliance as showing that its recordation on February 5, 1953 constituted notice to creditors, our reply is that such notice was ineffective and not binding on creditors because the California law on recordation does not require creditors to search the record to ascertain any such intention to create a mortgage or to anticipate its creation.

III.

Appellee Fails to Refute Appellant's Contention That, Assuming the Debt Was Not Created Until the Money Was Paid, the Recordation of the Mortgage Prior Thereto Was Ineffective.

Under Point IV of his Brief (pp. 25-29), Appellant contends that assuming, as Appellee argues, that the chattel mortgage was not accepted until the debt was created, and that the debt was not created until the money was paid to the mortgagor, it does not follow that there was no interval or delay between acceptance of the mortgage and its recordation, as Appellee argues, since the evidence as to the date of payment does not support such contention. This evidence, as the record discloses and as Appellant pointed out in its Opening Brief (p. 28), is to the effect that the money was advanced not on February 20, 1953, but four days thereafter, on February 24, 1953; and that this fact was conceded by Mr. Kornblum who appeared for the Bank [R. p. 55]. This being the situation, the recordation of the chattel mortgage on February 20, 1953 before the date on which Appellee admits the debt was created was of no legal effect and

therefore not binding on creditors. To overcome this, Appellee purports to supplement and correct our Statement of the Case at the outset of his Brief wherein he insists that the money was paid to Willen on February 20, 1953 (and not on February 24, 1953); and that the District Court so found. In reply, we can only reiterate what the record unquestionably shows the evidence to be on this matter; and that, therefore, the purported correction of our Statement of the Case is inaccurate.

Accordingly, it is respectfully urged that the District Court's decision should be reversed and the Referee's decision reinstated.

Respectfully submitted,

BROOKS & HOFFENBERG,

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Attorneys for Appellant.

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therefore not binding on creditors. To overcome this, Appellee purports to supplement and correct our Statement of the Case at the outset of his Brief wherein he insists that the money was paid to Willen on February 20, 1953 (and not on February 24, 1953); and that the District Court so found. In reply, we can only reiterate what the record unquestionably shows the evidence to be on this matter; and that, therefore, the purported correction of our Statement of the Case is inaccurate.

Accordingly, it is respectfully urged that the District Court's decision should be reversed and the Referee's decision reinstated.

Respectfully submitted,

BROOKS & HOFFENBERG,

GABRIEL HOFFENBERG, and

ROBERT N. RICHLAND,

Attorneys for Appellant.



No. 15,038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy of Estate
of S. A. Willen Company, a corporation, bankrupt,
Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,
Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING.

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No. 15,038

IN THE

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Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING.

*To the Honorable William E. Orr, James Alger Fee, and
Richard H. Chambers, Judges of the United States
Court of Appeals for the Ninth Circuit:*

Frank M. Chichester, Trustee in Bankruptcy of the
Estate of S. A. Willen Company, a corporation, bankrupt,
Appellant, respectfully presents to this Honorable Court
his petition requesting a rehearing in the above entitled
cause upon the following grounds:

1. That the Court overlooked the material evidence
in holding that the debt which the chattel mortgage

herein secured came into existence on February 20, 1953, whereas the evidence shows it did not come into being until February 24, 1953.

2. That the Court overlooked the argument of Appellant that it was first necessary to pass upon the validity of the escrow herein in order to determine the validity of the chattel mortgage.

3. That in holding that there was a conditional delivery of the chattel mortgage on February 4, 1953, which did not become effective or absolute until February 20, 1953, the Court misconceived the law.

4. That the Court overlooked the argument of Appellant that the chattel mortgage was ineffective as to creditors because of the unreasonable delay between the time of its delivery and the date of its recordation.

PRELIMINARY STATEMENT.

The Referee concluded that the chattel mortgage held by the Appellee bank herein was void because it was made to the bank-mortgagee, which was also acting as escrow holder in the transaction; that the delivery of the chattel mortgage took effect on February 4, 1953 (the date when the escrow was opened); and that since the chattel mortgage was not recorded until sixteen days later on February 20, 1953, its recordation did not operate as a valid lien as to the bankrupt's creditors. The District Court, in setting aside the Referee's decision, found that the delivery of the chattel mortgage was made only conditionally on February 4, 1953, and did not

become absolute until February 20, 1953 when, according to the District Court's finding, the money was paid over to the mortgagor; and said Court further held that in order to determine the validity of the chattel mortgage it was not necessary to decide the question whether the Appellee bank could be an escrow holder and at the same time a party to the transaction; and that the chattel mortgage was a valid lien and, therefore, effective as to the bankrupt's creditors.

In affirming the judgment of the District Court, this Honorable Court, as appears from its *Per Curiam* Opinion, has literally adopted the language of that Court, saying: "We are persuaded that the District Court reached the correct conclusion and that the reasoning employed by it in its Opinion is sound." With this determination Appellant respectfully disagrees, being of the conscientious belief that the District Court's conclusion was incorrect and its reasoning unsound.

GROUNDS FOR REHEARING.

I.

This Court Overlooked the Material Evidence In Holding That the Debt Which the Chattel Mortgage Herein Secured Came Into Existence on February 20, 1953, Whereas the Evidence Shows It Did Not Come Into Being Until February 24, 1953.

The Opinion of this Court upholds the finding of the District Court that the chattel mortgage became effective when the debt which it secured was created, which occurred when the money was paid over by the bank; and that this date was February 20, 1953. In his Opening Brief (p. 28) as well as in his Reply Brief (p. 6) Appellant drew attention to the fact that the money was not advanced until February 24, 1953. If the money was not paid until February 24, 1953, and no debt existed until that date, the chattel mortgage which was recorded on February 20, 1953 could not have been a valid one; for, as this Court's Opinion (p. 2) well says: "If there is no debt, there is no mortgage."

It, therefore, becomes material to ascertain the precise date on which the money was paid over. In order to remove all doubt, Appellant respectfully draws attention to his Opening Brief (pp. 27-28) wherein specific reference is made to Appellee's own Exhibit 5, and the proceedings before the Referee, reproduced as follows:

"Appellee-petitioner's Exhibit No. 5, three ledger sheets of the *Union Bank and Trust Company re S. A. Willen Company* [R. 73] shows that the money was advanced on February 24, 1953. [R. p. 55]. Quoting from the Reporter's Transcript:

"The Referee: *When was the money paid over?*
 Mr. Kornblum: On the 20th day of February.

The Referee: I was looking at the record here. I can't make it out.

Mr. Kornblum: Maybe I shouldn't have let Mr. Lukens go. But the money was paid at the time. There is an escrow and on the 20th day of February—in other words, the bank even took perhaps a longer time than the law requires to give notice to creditors. Now when the—

The Referee: It shows here apparently that the (13) money was advanced on 2-23-54, and—

Mr. Kornblum: And they didn't have to advance it until 2-20.

The Referee: And 2-24—

Mr. Kornblum: That is 1953. There seems to be some confusion in the pleadings. It is 1953.

The Referee: 2-24-53?

Mr. Kornblum: *That is right.*" (Emphasis added) [R. pp. 54-55].

From the above exchange between the Referee and Mr. Kornblum, representing the Appellee bank, it finally emerged clear that the money was paid over on "2-24-53", Mr. Kornblum assenting in the words, "That is right." Moreover, the ledger sheets aforesaid, introduced in evidence as Appellee-Petitioner's Exhibit No. 5, confirm Mr. Kornblum's assent that February 24, 1953 was the correct date on which the money passed; so that his first reply to the Referee wherein he stated above that it was paid on February 20, 1953, was an obvious error which Mr. Kornblum finally corrected.

Accordingly, Appellant respectfully submits that the finding in the Opinion that the money was paid over on February 20, 1953, is not only not supported by, but is actually contradicted by the evidence.

II.

The Court Overlooked the Argument of Appellant That It Was First Necessary to Pass Upon the Validity of the Escrow Herein in Order to Determine the Validity of the Chattel Mortgage.

This Honorable Court, in upholding the decision of the District Court overlooked the argument of Appellant that the Appellee-bank could not legally be an escrow holder in the instant transaction to which it was a party; and that where, as here, the bank occupied this dual position, the effect was to invalidate the escrow created on February 4, 1953, and in consequence, to bring about an immediate and absolute delivery of the chattel mortgage to the bank, as mortgagee, on that date. It was because the determination of the validity of the escrow was so vitally related to the question whether or not the delivery of the chattel mortgage on February 4, 1953, was a conditional or absolute one, as appears from Point III immediately succeeding Point II herein, that Appellant deemed it necessary for the District Court and this Honorable Court to pass upon the question. Aside from this consideration Appellant believes that the question whether banks may act as escrow holders in transactions in which they are interested parties is of such public importance as to merit serious consideration by this Court; and Appellant accordingly earnestly requests that this Honorable Court pass upon this question.

III.

The Court Misconceived the Law in Holding That There Was Here a Conditional Delivery of the Chattel Mortgage of February 4, 1953 Which Did Not Become Effective Until February 20, 1953.

Adopting the language of the District Court, this Court stated: "The act of the parties clearly indicates that the mortgage was accepted conditionally; the evidence clearly shows that the delivery to the bank on February 4, 1953 was conditional, etc.," that a "chattel mortgage is a contract;" and that "A contract can always be delivered conditionally," citing *Spade v. Cossett*, 10 Cal. App. 2d 782, 243 P. 2d 799 (1952). (Op. p. 2).

Appellant agrees that a contract may be delivered conditionally, subject, however, to the qualification that, if the delivery is to be conditional, *it must be made to a third party, such as an escrow holder*. If a contract is delivered by one of the parties thereto to the other, delivery may not be made conditionally, but it becomes absolute and the party to whom it is delivered "takes" free from the condition. The case of *Spade v. Cossett*, 110 Cal. App. 2d 782, *supra*, cited in the Opinion in support of the proposition that a contract may always be delivered conditionally involves a factual situation in which the delivery of a deposit receipt agreement was made by the seller of real estate to a real estate broker subject to the condition that it was not to be turned over to the purchaser unless the seller's wife agreed to the transaction.

Such a delivery to the broker (a third party) could, of course, be made conditionally. But the holding in the *Spade* case has no application to the instant situation where, in the absence of a valid escrow, the delivery of the chattel mortgage contract was made directly by the mortgagor to the bank *as mortgagee*; and the ruling of this Honorable Court to the contrary is, in Appellant's view, erroneous as a matter of law, as embodied in the applicable provisions of the California Civil Code below.

Section 1626 of the California Civil Code provides as follows:

"A contract takes effect upon its delivery to the party in whose favor it is made, or to his agent."

Section 1627 of said Code reads as follows:

"The provisions of the chapter on transfers in general concerning delivery of grants, absolute and conditional, *apply to all written contracts.*" (Emphasis added).

Examining the provisions of the chapter on "Transfers in General", it will be found that the pertinent sections of said Code are Sections 1056 and 1057,

Section 1056 reads as follows:

"A grant cannot be delivered to the grantee conditionally. Delivery to him or his agent is necessarily absolute *and the instrument takes effect thereupon discharged of any condition on which delivery was made.*" (Emphasis added).

Section 1057 of said Code provides:

"A grant may be deposited by the grantor *with a third person*, to be delivered on performance of a condition, and, on delivery by the depositary, it will

take effect. *While in the possession of the third person and subject to condition*, it is called an escrow.” (Emphasis supplied).

The above Sections 1056 and 1057 apply to all written contracts, under Section 1627 above cited. Accordingly, Sections 1056 and 1057 apply to a chattel mortgage which the Opinion finds to be a contract. Accordingly, any distinction between a grant and a contract is, in this connection, immaterial.

Since the Opinion of this Court is, in effect, that the validity of the escrow need not be determined, it follows that the escrow may be omitted entirely in determining when the delivery of the chattel mortgage became effective. Since the delivery was made to the bank, *as mortgagee*, on February 4, 1953, it became absolute on that date and the bank took the mortgage *discharged of any condition*, under the provisions of Section 1056 of the Code aforesaid. If, on the other hand, it could be asserted that delivery was made on that date to the bank *as escrow holder* (and not as mortgagee) it would have to be assumed that the escrow was valid, since it cannot be seriously argued that the Civil Code countenances an *invalid* escrow upon which to predicate a valid delivery. Since, as Appellant has consistently maintained, the escrow herein created was invalid, Section 1057 aforesaid is inapplicable; while under Section 1056, a conditional delivery of a contract cannot be made by one party to the other.

Without unduly protracting the discussion of the point that a conditional delivery could not legally have been made on February 4, 1953, to take effect at a later date, Appellant desires to call attention to the only case in Cali-

fornia, his counsel have been able to find, wherein it was held that, under Section 1056 of the California Code a conditional delivery of a written contract could not legally be made by one party to a contract to the other party, and that the attempt so to do in escrow would not be tolerated. In the case of *California Raisin Growers' Association v. Abbott*, 106 Cal. 601, wherein contracts were delivered *conditionally* by members of the Association to the Association (not a third party) the Court, on page 606 said:

“Even if delivery of the contracts in escrow, with the proviso alleged, *were tolerated* (and it is not—*Civ. Code, Secs. 1056, 1626, 1627*), the acceptance of the terms of the contracts by the producers of raisins, waived the escrow agreement.” (Emphasis added).

While it is true, that the question of the applicability of the above cited sections of the Code was not directly presented in the *Raisin Grower's* case, *supra*, it is hardly open to question that, had it been so presented, the Court would have held that delivery of contracts to an escrow holder who was also a party to the transaction would not have been tolerated.

Accordingly, Appellant submits most respectfully that the delivery of the chattel mortgage to the mortgagee bank became absolute on the date of such delivery, namely, February 4, 1953; and that the holding of this Court to the contrary is erroneous as a matter of law.

IV.

The Court Overlooked the Argument of Appellant That the Chattel Mortgage Was Ineffective as to Creditors Because of the Unreasonable Delay Between the Time of Its Delivery and the Date of Its Recordation.

Finally, the Court overlooked the argument of Appellant to the effect that the chattel mortgage, having been delivered to the bank, as mortgagee, on February 4, 1953, the delivery became absolute on that date, and that the chattel mortgage not having been recorded until February 20, 1953, the delay in such recordation rendered the mortgage ineffective as a lien binding on the bankrupt's creditors (Op. Br. pp. 24-32; Rep. Br. pp. 5-6).

Accordingly, Appellant respectfully prays that this Honorable Court will grant a rehearing herein, and upon such rehearing, reverse the judgment of the District Court and uphold the decision of the Referee.

Respectfully submitted,

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By GABRIEL HOFFENBERG,
Attorneys for Appellant.

Certificate of Gabriel Hoffenberg.

State of California, County of Los Angeles—ss.

GABRIEL HOFFENBERG, being duly sworn, deposes and says:

That he is one of the attorneys for the Appellant in the above entitled cause, and that in his conscientious judgment the within Petition for Rehearing is well founded in fact and in law, and that it is not interposed for the purpose of delay.

GABRIEL HOFFENBERG.

Subscribed and sworn to before me this 13th day of February, 1957.

MARGUERITE F. CRIPPS,

*Notary Public in and for the
said County and State.*

My Commission expires January 3, 1960.

No. 15039

United States
Court of Appeals
for the Ninth Circuit

CARL C. LEE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

APR 24 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.-4-13-56

PAUL P. O'BRIEN, CLERK

Chapter 1

The first chapter of the book is titled "Introduction". It discusses the importance of understanding the basics of the subject and provides a brief overview of the topics covered in the subsequent chapters.

The second chapter, "The Basics", covers the fundamental concepts and principles of the subject. It includes a detailed explanation of the terminology and the basic laws governing the field.

The third chapter, "Advanced Topics", delves into more complex and specialized areas of the subject. It explores the latest research and developments in the field.

The fourth chapter, "Applications", discusses the practical applications of the concepts and principles discussed in the previous chapters. It provides examples of how these concepts are used in real-world scenarios.

The fifth chapter, "Conclusion", summarizes the key points of the book and provides a final overview of the subject. It also includes some thoughts on the future of the field and the challenges ahead.

No. 15039

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Department of Justice,
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United States Attorney;

ROBERT H. SCHNACKE,

Assistant United States Attorney;

JOHN LOCKLEY,

Assistant United States Attorney;
United States Post Office Building,
San Francisco, California,

Attorneys for Plaintiff and Appellee.

PHILLIPS, AVAKIAN AND JOHNSTON,

J. RICHARD JOHNSTON,

Financial Building,
Oakland, California,

Attorneys for Defendant and Appellant.



In the United States District Court for the Northern
District of California, Southern Division

Criminal No. 34698

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL C. LEE,

Defendant.

INDICTMENT

(Violation: 26 U.S.C., Section 145(b)—
Evasion of Income Tax)

The grand jury charges:

That on or about the 15th day of March, 1951, in the Northern District of California, Carl C. Lee, late of Sacramento, California, who during the calendar year 1950 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$9,927.09 and that the amount of tax due and owing thereon was the sum of \$1,282.00, whereas, as he then and there well knew, their joint net income for the said calendar

year was the sum of \$69,162.69, upon which said net income there was owing to the United States of America an income tax of \$27,564.42.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

/s/ PAUL BURMAN,
Foreman.

/s/ LLOYD H. BURKE,
United States Attorney.

Approved as to Form:

/s/ JOHN LOCKLEY.

Penalty: 5 years and/or \$10,000.

Bail: \$2500.00.

Presented in open court and ordered.

[Endorsed]: Filed September 14, 1955.

/s/ GOODMAN,
Judge.

[Title of District Court and Cause.]

VERDICT

We, the Jury Find Carl C. Lee, the Defendant at the Bar: Guilty as Charged in the Indictment.

/s/ EMIL L. ANDERSON,
Foreman.

[Endorsed]: Filed December 14, 1955.

United States District Court for the Northern
District of California, Southern Division

No. 34698

UNITED STATES OF AMERICA

vs.

CARL C. LEE

JUDGMENT AND COMMITMENT

On this 11th day of January, 1956, came the attorney for the government and the defendant appeared in person and with counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation of Title 26, United States Code, Section 145(b)—Evasion of Income Tax—(Defendant Carl C. Lee, late of Sacramento, California, did, on or about March, 15, 1951, in the Northern District of California, wilfully and knowingly attempt to evade and defeat a large part of income tax due and owing by him and his wife to the United States of America for calendar year 1950, by filing and causing to be filed with Collector of Internal Revenue for First Internal Revenue Collection District of California, at San Francisco, a false and fraudulent joint income tax return on behalf of himself and his said wife for said calendar year), as charged in the indictment (single count); and the court having asked the defendant whether he has anything to say why judg-

ment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and pay a fine in sum of Ten Thousand Dollars (\$10,000) to the United States of America.

It Is Adjudged that defendant pay costs of prosecution herein.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE B. HARRIS,

United States District Judge.

Examined by:

/s/ JOHN LOCKLEY,

Assistant U. S. Attorney.

The Court recommends commitment to: An institution to be designated by U. S. Attorney General.

[Endorsed]: Filed January 12, 1956.

Entered January 13, 1956.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

* * *

No. 18

There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due.

Block v. United States

(1955, C.A. 9) 221 F. 2d 786, rehearing
denied June 14, 1955, 223 F. 2d 297.

.....,

United States District Judge.

Given:

Refused:

Covered:

No. 27

The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor.

Section 145(a), Internal Revenue Code of 1939.

.....,

United States District Judge.

Given:

Refused:

Covered:

Dated: December 14, 1955.

/s/ GEORGE B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant named above hereby appeals from the judgment of the above-entitled Court rendered in the above-entitled matter on the 11th day of January, 1956, and respectfully states as follows:

(1) Appellant's name and address are as follows:

Carl C. Lee,
4700 Capital Drive,
Sacramento, California.

(2) The names and addresses of appellant's attorneys are as follows:

Fred Pierce,
1023 H Street.
Sacramento, California.

J. Richard Johnston,
Financial Center Building,
Oakland 12, California,
Telephone: GLencourt 2-2133.

(3) The offense of which appellant was convicted is an attempt to evade and defeat income tax for the year 1950 in violation of Section 145(b) of the Internal Revenue Code. The indictment alleged that defendant attempted to evade tax in the amount of \$26,282.42.

(4) The judgment of the Court was that defendant be fined \$10,000.00, plus the costs of the action, and that he be confined in an institution designated by the Attorney General for a period of five years. Judgment was rendered on January 11, 1956.

(5) Appellant is now confined in San Francisco County Jail No. 1 in the City of San Francisco, California.

(6) Appellant appeals from said judgment to

the United States Court of Appeals for the Ninth Circuit.

Dated this 12th day of January, 1956.

FRED PIERCE,

J. RICHARD JOHNSTON,

By /s/ J. RICHARD JOHNSTON,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 11th day of January, 1956, against Carl Chong Lee, aka Lee Sere Chong, the clerk is requested to tax the following as costs:

Fees of the clerk.....\$ 15.00

Fees of the marshal

(Title 28 U.S. Code, §1921)..... 100.00

*Fees of the court reporter for all or any
part of the transcript necessarily ob-
tained for use in the case..... 434.40

Fees for witnesses..... 418.10

(Itemized on reverse side)

Docket fees under 28 U.S.C. 1923..... 20.00

Total\$987.50

*To Kenneth J. Peck, Official Reporter, 345 Post Office Bldg., San Francisco, Calif., December 5 through 12, 1955.

Costs taxed in sum of \$987.50.

1/17/56 at 10:30 a.m.

/s/ C. W. CALBREATH,
Clerk.

State of California,
City & County of San Francisco—ss.

I, John Lockley, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to J. Richard Johnston, Financial Center Bldg., Fourteenth at Franklin, Oakland, California, with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 17th day of January, 1956, at 10:00 a.m.

/s/ JOHN LOCKLEY,
Assistant U. S. Attorney,
Attorney for Plaintiff.

Subscribed and sworn to before me this 13th day of January, A.D. 1956, at San Francisco, California.

[Seal] /s/ WM. J. FLINN,
Deputy Clerk, United States District Court, Northern District of California.

[Endorsed]: Filed January 13, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO PLAINTIFF'S BILL
OF COSTS

Defendant objects to the following item on the grounds stated below, in the Bill of Costs filed herein by plaintiff on January 13, 1956:

Fees of the Court Reporter.....\$434.40

This represents the cost of a copy of a daily transcript purchased by plaintiff for its own use and convenience, which is not taxable against defendant.

Respectfully Submitted,

J. RICHARD JOHNSTON,
FRED PIERCE,

By /s/ J. RICHARD JOHNSTON,
Attorneys for Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S
OBJECTION TO PLAINTIFF'S BILL OF
COSTS

The cost of a daily transcript purchased for the use and convenience of plaintiff (as distinguished from a transcript ordered by the court for its use) is not taxable to defendant.

Stallo v. Wagner

(C.A. 2, 1917) 245 Fed. 636

Atwood v. Jacques
(C.C. 1894) 63 Fed. 561

Vort v. McGrath
(D.C. D.C. 1951) 108 F. Supp. 263, 264.

See also Kenyon v. Automatic Instrument
Co. (D.C. W.D. Mich. 1950) 10 F.R.D. 248,
254; Donato v. Parker Pen Co. (D.C. S.D.
N.Y. 1945) 7 F.R.D. 148; Hope Basket Co.
v. Product Advancement Corp. (D.C. W.D.
Mich. 1952) 104 F. Supp. 444, 450.

Respectfully Submitted,

J. RICHARD JOHNSTON,
FRED PIERCE,

By /s/ J. RICHARD JOHNSTON,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

ORDER SUSTAINING ALLOWANCE OF COST OF TRANSCRIPT

Defendant has appealed from the ruling of the Clerk of the Court allowing as an item of cost a transcript obtained by the Government for its use during the trial.

28 U.S.C.A. 1920 (2) provides that a Court may tax as costs "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; * * *"

The Court finds that the stenographic transcript was necessarily obtained by counsel for plaintiff for use in the trial of the case.

Accordingly, it is ordered that defendant's objection to allowance of cost in the amount of \$434.40 for the transcript be, and the same hereby is, overruled and the item is allowed.

Dated: January 26, 1956.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant named above hereby appeals from the judgment of the above-entitled Court rendered in the above-entitled matter on the 11th day of January, 1956, and respectfully states as follows:

(1) Appellant's name and address are as follows:

Carl C. Lee,
4700 Capital Drive,
Sacramento, California.

(2) The names and addresses of appellant's attorneys are as follows:

Fred Pierce,
1023 H Street,
Sacramento, California.

J. Richard Johnston,
Financial Center Building,
Oakland 12, California,
Telephone: GLencourt 2-2133.

(3) The offense of which appellant was convicted is an attempt to evade and defeat income tax for the year 1950 in violation of Section 145(b) of the Internal Revenue Code. The indictment alleged that defendant attempted to evade tax in the amount of \$26,282.42.

(4) On January 26, 1956, the Court made its order sustaining the allowance, as an item of cost taxed against the defendant, of the cost of a daily copy of the reporter's transcript obtained by the Government for its use during the trial.

(5) Appellant is now at liberty on bail in the amount of \$10,000.00 pending appeal.

(6) Appellant appeals from said order to the United States Court of Appeals for the Ninth Circuit.

Dated this 2nd day of February, 1956.

FRED PIERCE,

J. RICHARD JOHNSTON,

By /s/ J. RICHARD JOHNSTON,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed February 3, 1956.

In the United States District Court for the North-
ern District of California, Southern Division

No. 34698

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL C. LEE,

Defendant.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, December 5, 1955

Appearances:

For the United States:

LLOYD H. BURKE, ESQ.,

United States Attorney, by

JOHN LOCKLEY, ESQ.,

Assistant United States Attorney.

For the Defendant:

PHILLIPS, AVAKIAN &

JOHNSTON, by

J. RICHARD JOHNSTON, ESQ., and

FRED PIERCE, ESQ.

* * *

DARROLD D. DeCOE

called as a witness on behalf of the Government,
sworn:

The Clerk: Please state your name, your address
and your occupation to the Court and to the jury.

A. Donald D. DeCoe, Jr. My address is 1000
Casa Lotta Way, Sacramento.

Q. And your occupation?

A. My occupation is Deputy Sheriff of Sacra-
mento County.

Direct Examination

By Mr. Lockley:

* * *

Q. I show you Exhibit 1, in evidence, and ask
you if you can identify that document?

A. Yes, I can.

Q. And what is it?

A. This is the income tax return of Carl C.
and Lily Lee for the year 1950. [22*]

Q. I call your attention to the signature in the
lower left hand corner, "Signature of person other
than taxpayer preparing this return." Whose sig-
nature is that? A. That is my signature.

Q. And you signed that? A. I did, sir.

Q. Did you also prepare the typewritten portion
of this income tax return? A. I did.

Q. Now, calling your attention to page 4 of the
return, Schedule C, entitled "Schedule of Profit or
Loss from business or profession," on the line 1,

*Page numbering appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Darrold D. DeCoe.)

“Total receipts from business or profession \$15,887.75,” did you insert that figure? A. I did.

Q. Can you tell me where you obtained the information for that?

A. From a financial statement or memorandum of receipts and disbursements furnished by Dr. Lee.

Q. Do you know where that financial statement is today? A. I do not.

Q. Now, did you have any conversation with Dr. Lee at the time he supplied the financial statement to you? A. Regarding this \$15,887.75?

Q. Yes. A. No, not about that. [23]

Q. Did you have any conversation with him at any time prior thereto regarding his gross receipts?

A. Well, I had a conversation with him, Mr. Lockley, prior to this form. I don't know whether it was about receipts or disbursements, however.

I know that the first returns that we prepared that year, the tax was greater, and Dr. Lee was sure that we had made an error and he went back and reviewed his figures and brought in a new sheet to work from.

Q. You prepared two returns, then, for him in that year? A. I did.

Q. Now, do you have any recollection as to how much was reported in gross receipts for the first return that you prepared?

A. I have no recollection of the amount.

Q. Do you have any recollection as to what was claimed as cost of goods sold or other business deductions on the first return that you prepared?

(Testimony of Darrold D. DeCoe.)

A. I have no recollection of the amount.

Q. Do you have any recollection as to the amount of tax which was due and owing on the first return you prepared?

A. The only recollection I have is that it was in excess of the amount that shows on this return I have in my hand. I don't know just exactly how much in excess it was.

Q. Do you recall, was there anyone else present at the [24] time you had a conversation with Dr. Lee regarding the preparation of the first return?

A. I don't recall now, other than my father may have been there.

Q. Do you remember where the conversation was? A. No, I don't.

Q. Do you remember about when?

A. Well, it would be the early part of 1951, prior to March 14th when this one was dated.

Q. As best you can recall, will you tell us what the substance of that meeting was, what the conversation was?

A. Well, I can't recall the exact conversation, but I took the financial statement or memorandum of receipts and disbursements as furnished our office, given to my father, and I put them into a 1040 and 1040C, I believe it is, and when I completed it I showed it to my father and he, together with me, said, "Carl isn't going to like this. He has a lot of tax to pay."

Then when Dr. Lee saw it he thought that it was in error. I should say, he thought it was in error,

(Testimony of Darrold D. DeCoe.)

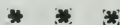
and at that time, why, he brought us in a new schedule to work his tax from. In other words, he went out and reviewed his books, evidently.

Q. And you don't know whether he gave you a schedule with larger income or greater [25] expenses?

A. No, I don't recall at all just how the other one differed in receipts and disbursements. All I remember is that the tax was greater in the first one that we prepared.

Q. I also note on page 1 of the return is a stamp under which it says, "This return based on information submitted by taxpayer without verification," and "Darald D. DeCoe." Is that—what is the significance of that stamp, Mr. DeCoe?

A. We place that stamp on every return that we did inasmuch as our office conducted no audit of the taxpayers. In other words, we accepted their figures, explained to them just what would be deductible and what wouldn't be, and told them they were the ones that would have to verify to the Collector of Internal Revenue any discrepancies. [26]



MORTON D. HARMON

called as a witness on behalf of the Government;
sworn.

The Clerk: Please state your name, your address and your occupation to the Court and jury.

A. Morton D. Harmon, 9645 Hilltop Row, Bellevue, Washington. [50]

The Clerk: And your occupation?

A. Vice-President, Walston & Co.

Direct Examination

By Mr. Lockley:

Q. In what business does Walston & Co. engage, Mr. Harmon?

A. Members of the New York Stock Exchange.

Q. And you are a vice-president of that organization?

A. Yes, sir.

Q. Prior to the time you became a vice-president had you had any other position in the company?

A. Yes. I was a resident partner.

Q. Did you at some time reside in California?

A. Yes, sir.

Q. Where? A. Modesto, California.

Q. And were you living in that city during the year 1950?

A. Yes, sir.

Q. Now do you know the defendant, Carl C. Lee?

A. Yes, sir.

Q. Do you recall approximately when you first met him?

A. About the first part part of 1949.

Q. And in what connection did you meet him?

(Testimony of Morton D. Harmon.)

A. Through a friend of mine.

Q. For what purpose? Was it social, business or otherwise? A. For medication. [51]

Q. For medication. Has he ever been a client of yours, as a stockbroker? A. No, sir.

Q. Where did you go—see Mr. Lee when you first met him?

A. At his place of business. I believe it was 522 “J”-Street, Sacramento. I believe that was the address.

Mr. Lockley: I think that counsel stipulate it was 512.

Mr. Johnston: That is correct.

Q. (By Mr. Lockley): Just for the sake of the record, 512 “J” Street, does that sound right?

A. Yes, sir.

Q. Now, did you have anything wrong with you physically, Mr. Harmon? A. No.

Q. Your purpose in going to see Dr. Lee, then, was more in the nature of insurance?

Mr. Johnston: Objected to.

Q. (By Mr. Lockley): What was your purpose in going to see him?

A. My purpose in going to see Dr. Lee was to build up my body in the form of health.

Q. But there was nothing physically wrong with you that you know of at the time?

A. If you mean there was anything wrong with me, I had no chronic ailment, no. [52]

Q. Now what arrangements did you have with

(Testimony of Morton D. Harmon.)

Dr. Lee during the year 1950 for the payment of medical services that he rendered to you?

Mr. Johnston: Objected to, if the Court please, on the ground it assumes facts not in evidence. There is no record of medical service.

Q. (By Mr. Lockley): Did he give you medical service in 1950? A. Yes, sir.

Q. Did you have some arrangement whereby you were to pay him for those services? A. Yes.

Q. What arrangements were they?

A. I paid him by check for part of his services and I paid him cash for part of his services.

Q. Did Mr. Lee ever send you a bill?

A. No, sir.

Q. Now how did you know how much you owed him? A. By mutual agreement. [53]

* * *

Q. Now in addition to these two checks for \$100 each in 1950, did you make any other payments to Dr. Lee?

A. According to my records I made a payment to Dr. Lee on April 17th, 1950, the sum of \$110.

Q. And how was that payment made?

A. In cash.

Q. And was there any particular reason for making it in cash other than by check?

A. You mean was it my choice?

Q. Why did you pay it in currency?

A. I was requested to.

Q. By whom? [59] A. Dr. Lee.

(Testimony of Morton D. Harmon.)

Q. Do you remember when he made that request of you? A. When he made it?

Q. Yes.

A. At the time I received the medication, as was his practice, I did not pay him at the time that I was there. I generally would mail him the check.

Q. And in this instance you paid him in currency? A. In cash, in currency.

Q. Do you recall if you mailed this currency to him or handed it to him personally?

A. Mr. Lockley, I cannot.

Q. And for what purpose was the \$110 in currency paid? A. Same thing, for medication.

Q. In addition to this \$110, then, did you make any other payments to Dr. Lee in 1950?

A. August 11th, 1950.

Q. And how much then? A. \$220.

Q. And how was that paid? A. In cash.

Q. Was there any reason for making the payment in currency?

A. The same reason as before.

Q. That is, Dr. Lee asked you to make it in currency? A. That is correct. [60]

Q. Now I note that the payment increases from \$100 in February to \$110 in April. Do you know why that increase was made?

A. As Dr. Lee explained to me, at times the prices of his medication was different because his source of supply wasn't always at the same [61] price.

R. F. FRASER

called as a witness on behalf of the Government,
sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. R. F. Fraser, Stockton, California.

The Clerk: And your occupation?

A. Retired right at the present time.

Direct Examination

By Mr. Lockley:

Q. What was your occupation in 1950, Mr. Fraser?

A. Well, I was more or less active at that time in the heating and air-conditioning of one of the branches of the business that I have up there.

Q. What was the name of the company?

A. Fraser Sales & Service Company.

Q. And you were the president and manager of that company?

A. Prior to 1950 I was. About 1946 or '7 I turned the [75] management over to one of the men, junior members of the organization.

Q. Do you know the defendant, Carl C. Lee?

A. Yes, I do.

Q. Do you recall the approximate date when you first met him?

A. I couldn't call the approximate date. I could tell you the approximate time of year it was.

Q. When was that?

(Testimony of R. F. Fraser.)

A. It was the middle of 1950, I would say, maybe in June.

Q. And what were the circumstances of that first meeting?

A. The circumstances leading up to the meeting with Dr. Lee, did you say? Is that your question?

Q. No. Why did you go to see him if you did?

A. I went to see Dr. Lee through a friend of mine.

Q. For what purpose?

A. For medication.

Q. Did he diagnose your physical condition or give you any physical examination at the time you first saw him?

A. Well, the first physical examination he gave was taking your blood pressure and asking for a sample of urine to have it analyzed. That is the total of the examination, as I recall it.

Q. Did you thereafter retain Dr. Lee for professional services? [76]

A. I believe about a week or so after he took the sample of urine I went back up there again on appointment, and at that time he started me out on what he called tea—bottles he called tea.

Q. Do you know what was in the bottles of tea?

A. I have no idea.

Q. It was a liquid medicine of some sort?

A. Liquid medicine, that is right.

Q. How often were you to take this medicine?

A. Well, I used to get enough—he gave me, I think, about three quarts or—no, they are probably

(Testimony of R. F. Fraser.)

pints, pint bottles, and they would last me, I would say, approximately two weeks or in that neighborhood.

Q. How often did you go to see Dr. Lee, if you can recall, during the year 1950 for professional services?

A. Well, while I was taking that particular type of medicine or medication I would say I would go up there about every two weeks.

Q. Did you have any arrangement with Dr. Lee at the outset as to how much money you were to pay him for his services? A. No.

Q. Did he ever send you a bill letting you know how much you owed him?

A. Never. No bills. [77]

Q. Did you ever have any discussion with him, then, as to how much you would pay him at the beginning of the period when you retained him?

A. At the beginning there was no discussion of any over-all cost, no.

Q. Well, did you pay him some money?

A. I paid him some money at the beginning, yes.

Q. How did you know how much to pay him?

A. He would have a set fee for the tea that I took with me, \$30 or \$40 or whatever it was, and I would pay him for that at that time.

Q. Was that the situation during the year 1950?

A. I would say the beginning part of the year, yes—or the latter part of the year, rather, not the whole year.

(Testimony of R. F. Fraser.)

Q. How did you pay Dr. Lee for the herbs that you took with you?

A. Well, I would go up there and pick up the herbs occasionally and I would not pay him. I would maybe let it go until the following visit after that, so therefore in order to pay the \$35 or \$40, whatever the amount was, I would give him a check at that time, maybe for three batches of these herbs that he gave me.

Q. So the amount you paid him would vary from time to time?

A. That would vary from time to time, yes, sir.

Q. Do you know how much it was costing you per week? [78]

A. Well, offhanded I would say I can't recall, but I would say maybe \$35 a week or \$40, something like that.

Q. Did you have any later arrangement with Dr. Lee whereby you paid him for a different kind of medicine?

A. Well, yes, I did.

Q. When did that arrangement come about?

A. Oh, I would say probably a month or six weeks or so after I started taking the tea.

Q. Did you have any conversation with him at that time?

A. Well, prior to that time I was told—if I can inject this in here?

Q. By whom were you told?

A. Mr. Phelps in Sacramento.

Mr. Johnston: I object to that as hearsay.

Q. (By Mr. Lockley): Just confine yourself to

(Testimony of R. F. Fraser.)

what the defendant, Dr. Lee himself, told you. Did he say anything to you about any different course of treatment than this \$35-a-week course you were taking?

A. He said later he would start me on a different type of medicine and it was real expensive.

Q. Did he say what type of medicine that was?

A. He never named the medicine. He said it was an herb from China that was smuggled into the country.

The Court: What was that again?

A. An herb from China. [79]

Q. (By Mr. Lockley): Did he say how much that would cost?

A. No, he didn't tell me how much that would cost until such time as we—in other words, the cost, the discussion of cost was led up to over a period of several times I was down at Sacramento—paving the way.

Q. Did he eventually name a figure?

A. Yes, he named a figure and I objected to the figure because it was too high.

Q. How much was it that he named?

A. Well, he started talking about some of his clients that were paying as high as forty-five and fifty thousand dollars, and things of that sort, for this particular treatment.

Q. He told you that he had other clients that were paying him forty-five and fifty thousand dollars?

A. He said that he had other clients, yes, that

(Testimony of R. F. Fraser.)

were paying large sums of money for this same treatment.

Q. Did he ask any specific sum of money from you for this treatment?

A. Yes, he did. He had two or three quotes at the time, according to the strength of the treatment.

Q. Can you tell me what figures he did mention to you?

A. Well, the course that we finally settled on there was for \$12,500.

Q. And did you take that course of treatment?

A. I did. [80]

Q. Did you pay him the \$12,500?

A. Yes, I did.

Q. Did you have any discussion with him prior to that about any more expensive course of treatment?

A. No, outside of the fact that he had mentioned that—well, he recommended that more expensive course for me, in which I couldn't see myself clear to take.

Q. Now, was there any discussion between you as to how payment was to be made for the more expensive course of treatment?

A. Yes, when he told me what the amount of the treatment was going to cost and I told him that I would try it, he said, "I want the money in cash."

Q. Did you give him the money in cash?

A. Yes, I got them all in \$100 bills at his instructions.

(Testimony of R. F. Fraser.)

Q. He told you to get \$100?

A. That is right. [81]

* * *

Q. Did he ever have any conversation with you concerning the kind of records that you were to keep of the transaction?

A. Not during the time I was visiting, no.

Q. Did you have a later discussion with him at any time?

A. Well, Dr. Lee did visit me in Stockton, yes, after the Internal Revenue started to checking up on him.

Q. And about when did Dr. Lee come to see you in Stockton?

A. I would say about a year and a half ago or something of that sort.

Q. Was anybody else present with him at that time? A. No.

Q. Where did he visit you?

A. We were remodelling one of my buildings there, and that is where he finally caught up with me and talked to me inside the building there where the remodelling was going on.

Q. Was there anyone else within earshot who could have overheard your conversation?

A. No, because he requested we go to one side and talk.

Q. Can you tell me, not in exact words but in substance, what that conversation was?

A. Well, the first time that Dr. Lee came in

(Testimony of R. F. Fraser.)

there he wanted to know if the Internal Revenue Department had been there to see me, and I told him yes. He wanted to know what I told them, and I said that I told them the exact truth, the amount of money I gave him. He was very much disturbed to think that [88] I did it, and he wanted to know if——

Mr. Johnston: Excuse me, I am going to ask that the statement that he was very much disturbed be stricken as a conclusion of the witness.

The Court: Well, that may go out. Will you state what he said and what you said? [88A]

A. Well, he wanted to know what I had told the Internal Revenue Department, and I told him that I had shown him the cancelled checks that I had written and I told him the amount that I had paid. He wanted to know if he couldn't work out a deal whereby I would testify that I made a loan to him for this amount instead of medical treatment. I told him "No, I would not testify to anything of that sort."

Q. Did you ever make a loan to him of any sort?

A. No.

Q. Did you ever have any financial transactions with him other than those represented by these checks during 1950? A. No.

Q. Or any other year? A. No.

Q. And you say that this was the first time he came to see you. Did he see you on any later date?

A. He came up again to see me.

Q. And who was present at the time, if anyone?

(Testimony of R. F. Fraser.)

A. Just he. He was alone, as far as I know.

Q. And when was this?

A. I would say probably a month later, something like that.

Q. And where was the meeting?

A. In the same place.

Q. What was said at that meeting?

A. Well, it was just more or less along the same lines as [89] our first meeting.

Q. Well, can you tell us as best you can remember what was said?

A. Well, he wanted to know if I wouldn't—as I stated previously, if I wouldn't state that I had made this loan to him and that he paid me back. I told him I couldn't make no such statement as that; in the first place, I couldn't state I was making a loan without security, and in the second place, if he paid me back, where did the money go. I would have no record of where I deposited it.

The Court: I couldn't hear your last statement. You had no what?

The Witness: I told him I had no record of the money, depositing the money, if I was called upon to show, and furthermore that I wouldn't make a false statement of that sort.

Q. (By Mr. Lockley): If you know, was there any difference in the kind of herbs or treatment that you received for the checks represented by Exhibit No. 6 and the currency represented by Exhibit No. 7?

A. Yes. The checks for the tea or the herbs,

(Testimony of R. F. Fraser.)

whatever they were, was a liquid furnished in probably pint bottles. You take a cupful of that, as I remember, about three times a day. This check here was for a black substance in a little small bottle about that big. You take 40 drops a day. That was what [90] this was for here.

Q. That is what the \$12,500 was for?

A. That's right, yes.

Q. I believe you testified——

The Court: Pardon me, counsel. How many bottles did you receive for that?

A. Six months' supply.

Q. That was the course of treatment?

A. May I make a correction? That was a three months' supply, three months' supply.

Q. (By Mr. Lockley): At the conclusion of the three months did you have any discussion with Dr. Lee concerning continuing the course of treatment?

A. Yes, I was still going to him.

Q. Well, did you offer to buy or did Dr. Lee offer to sell you any more of the small bottles of the black substance after the original \$12,500 was exhausted?

A. Yes, he did.

Q. And can you tell me what conversation you had on that occasion?

A. Yes, I can. I will have to confess to one thing. I was so damned embarrassed as to admitting that I paid this kind of money that I didn't tell your men all that I spent, but I did tell counsel that I did pay that kind of money. I don't know whether that is good or bad. [91]

(Testimony of R. F. Fraser.)

Q. You mean the \$12,500 is not all of the currency that you spent with Dr. Lee?

A. Just half of it.

Q. How much additional did you pay Dr. Lee?

A. The total treatment there was \$45,000 for which I paid him practically half of that, paid him half of that. That was for the full six months of treatment.

Q. And when did you pay the balance then of the amount, about half of \$45,000?

A. Well, it's out. I can get my bank book here and tell you, which you folks haven't seen. I was wishing I wouldn't get to this point. As a matter of fact, I closed the back of this book off hoping I wouldn't have to get into it.

Mr. Johnston: If the Court please, I didn't hear that last statement.

The Court: Nor did I. Would you read it, please?

(Record read.)

The Witness: On September 29th I drew \$8000.00 in cash out of the bank; October 5th, I drew \$3500; on October 6th, I drew \$2000. That was \$13,500.

Q. (By Mr. Lockley): And that's added to the \$12,500?

A. I likewise took that up in cash, yes, in \$100.

Q. A total then of \$26,000. May I have your check stubs?

(Testimony of R. F. Fraser.)

A. You never got those checks. Those are check stubs here but you never got the checks. [92]

* * *

The Court: Do you concede Dr. Lee received \$13,500?

Mr. Johnston: No, sir, we do not.

The Court: You do not?

Mr. Johnston: We don't concede he received a cent of that money.

The Court: Do you deny he received any part of the \$13,000?

Mr. Johnston: We do. And likewise the \$12,500 as to which the witness first testified.

The Court: Well, if that is your position, Mr. Johnston, It is quite evident, Mr. Fraser, the position taken by the defense in this case. They deny the receipt in whole or in part of the \$13,500, and I assume equally they will deny in whole or in part the receipt of additional sums of money.

Mr. Johnston: And also the \$12,500. [98]

* * *

Cross-Examination

By Mr. Johnston:

* * *

Q. Well, just so we can be clear, Mr. Fraser, was when that happened about a week before June 24th with regard to this other kind of treatment? As I understand your testimony this morning, sir, you testified that it was about a week before June 24th

(Testimony of R. F. Fraser.)

that the subject of some other treatment was first discussed.

A. The financial end of it, yes, the cost; that was getting down to the cost.

Q. That was when the question of cost was discussed?

A. Prior to that it was talked about but no price mentioned.

Q. And your testimony was, I think, that there was some discussion about forty thousand or fifty thousand or sixty thousand dollars.

A. He kept quoting different figures, yes.

Q. And you protested that the high figures were too much, I take it? A. That's right.

Q. What was the final result, the conclusion of that discussion?

A. Well, it would be pretty doggone hard to explain. I might state it in this fashion, that he would explain that these particular herbs that he had, whatever they were, came in different strengths and naturally he wanted me to take the stronger one which cost more money.

Q. Did he give a name to the herbs? [207]

A. No. There was a military secret. I don't know. He never mentioned that.

Q. Did he show them to you?

A. No, never saw them until I paid for them. And he wanted to sell me the year's treatment, which I wouldn't go for. I said I would take the three months' treatment and see how I felt at the end of the three months.

(Testimony of R. F. Fraser.)

Q. The year's treatment was \$45,000?

A. We had argued between forty five and sixty. We hadn't settled on it.

Q. When you finally decided to take the three month treatment——

A. I told him I wouldn't go over forty-five and that is when he gave me this first treatment here and it cost me twelve five, the fact that it was supposed to be stronger than the \$45,000 medicine, it was supposed to be.

Q. Well, that would figure at the rate of \$50,000 for a year? A. Yes.

Q. He actually gave you or handed you some of this medicine on June 24th, did he?

A. Yes. That is the first medicine I got of that type.

Q. That is the date of this \$11,000 check, which is in evidence as Government's Exhibit 7?

A. That's right. [208]

* * *

ILA HIGH

called as a witness on behalf of the government; sworn. [312]

The Clerk: Please state your name, your address and your occupation, if any, to the Court and to the jury.

A. I am Mrs. Ila High.

The Clerk: Will you spell your name?

A. I-l-a H-i-g-h. Route 6, Box 1448½, Modesto,

(Testimony of Ila High.)

California. I am Grace A. Cavell's secretary and bookkeeper.

Direct Examination

By Mr. Lockley:

Q. How long have you been employed by Mrs. Cavell, Mrs. High?

A. Since August the 7th of 1947.

Q. And what is the nature of your duties?

A. I do everything for her. I keep her books. I keep track of all of her appointments. I take care of all of her holdings, anything pertaining to her rentals. I just do everything. I am the only employee she has.

Q. And you were so employed in 1950, is that correct?

A. Correct.

Q. Now, have you ever met the defendant Lee?

A. Yes.

Q. And where did you first meet him?

A. In his office in Sacramento.

Q. And on what day, if you remember?

A. August 7, 1950.

Q. Was anyone else present?

A. Grace A. Cavell. [313]

Q. That is your employer?

A. Correct. [314]

* * *

Q. On Exhibit 24 there are some markings in pencil?

A. Yes.

Q. And what do those markings denote?

A. They denote the cash that was given to Dr.

(Testimony of Ila High.)

Lee, the [320] amounts where I got it, for my record so I would know.

Q. Now, prior to making those last payments as shown by Exhibit 24, were you present at any discussion with Dr. Lee concerning such payments?

A. Yes, I was with Mrs. Cavell at all the appointments.

Q. And at what time was that discussion, if you remember it?

A. You mean for this cash amount?

Q. Yes. What date?

A. Well, now, it would have to be on August the 28th because we were asked to bring that amount in cash, and we got the money ready to take with us when we went on September the 5th.

Q. Do you remember what the conversation was as to the purpose for which the cash payment was to be made?

A. Yes. Dr. Lee said that he was giving her herbs that were very expensive and that he did not keep this money but it would be handed to a party who brought those herbs to him. [321]

The Court: Excuse me. I could not hear the last answer.

The Witness: I am sorry.

The Court: Mr. Reporter, would you mind reading that last answer?

(Answer read.)

Q. (By Mr. Lockley): Was there any discus-

(Testimony of Ila High.)

sion as to the amount of money that Mrs. Cavell would pay him on the first occasion of August 28th?

A. Well, the only part I could recollect would be this sum. At different times different sums were mentioned, but I can't say just when.

Q. Now, how much was paid to Dr. Lee on September 5?

A. A check for \$100, which was check No. 156, and cash for \$550 was handed in currency. [322]

* * *

Q. Now, was there any discussion with Dr. Lee as to how payment was to be made to him, in cash or by check?

A. Yes, he wanted the \$100 in check and he wanted the other in currency. [323]

* * *

Q. And the number 993 shown on the record book, does that identify the check which you have in your hand?

A. Oh, yes, yes.

Q. Was there any reason for writing that portion of the record in pencil rather than in ink?

A. Yes. Dr. Lee had asked us not to make a record of it, and I thought when I don't put it in ink that was not a record. This was a little record for myself in pencil.

Q. And when did he make that request of you?

A. I would say on August the 28th when he asked for it. It was brought the next week on September 5th.

(Testimony of Ila High.)

Q. How did you know how much money to bring to him?

A. Because he had asked for that amount. [325]

* * *

Q. (By Mr. Lockley): Was there any reason, if you know, Mrs. High, why the amount increased from \$550 on September 12th to \$1100 on September 18th?

A. As I understand it, this herb, which was expensive, had been increased slightly.

Mr. Pierce: Just a minute. We wish to interpose an objection, Your Honor, on the ground that they haven't fixed [327] the time. I don't know whether she is talking about from knowledge or hearsay.

Q. (By Mr. Lockley): Did you have any discussion in your presence with Dr. Lee concerning the increase in price? A. Yes.

Q. All right. Now, when was this discussion?

A. The \$1100 would be when we went on the 19th of August. On the 19th of August he said when we returned the next week would we bring \$1100 as he had changed the formula and it would cost more.

Q. Now, are you correct on your date, the 19th of August?

A. I mean the 12th of September, come there on the 19th. I am one ahead of you. That's right. I am sorry.

Q. When you went there on the 12th of September he asked you to bring \$1100 when you came the next week on the 19th? A. That's right.

(Testimony of Ila High.)

Q. Now, did he explain why the amount was to be increased? A. Yes.

Q. Why was it?

A. He was using more of this same expensive herb.

Q. He was using more herbs?

A. That is right. Or a little of it. I can't say how much. I don't know. [328]

* * *

Q. And for what purpose were those two checks drawn?

A. To take the currency to Dr. Lee on the 26th.

Q. Were they cashed?

A. Cashed probably by myself.

Q. And were you present at the time?

A. Oh, yes, always whenever she went out; she never went alone.

Q. Did you see the currency turned over to Dr. Lee?
A. Yes, definitely. [330]

* * *

Q. And what was done with those checks after they were drawn?

A. They were cashed at the bank and put in an envelope and taken to Dr. Lee on October 17th.

Q. And did you have——

The Court: The proceeds were placed in an envelope?

A. Yes, we always carried the currency in an envelope, and put it in a purse and handed it to him.

Q. (By Mr. Lockley): At any time during the

(Testimony of Ila High.)

course of the treatment that Mrs. Cavell was taking from Dr. Lee, did he have any conversation with her relating to a more expensive series of treatments?

A. Yes.

Q. Do you remember when the first such conversation took place? A. September the 26th.

Q. And how do you relate that date?

A. I made a notation of it.

Q. And on what type of record?

A. In the back of what we call a Day Book. On our right sheet each of that book is our cash; on the left side is our daily entry. I didn't make it there, but we turned to the very back of the book and put it on the very last page of [337] our 1950 daily book.

Q. Was it your practice to make such memorandum notations in your books?

A. Yes. Mrs. Cavell kept all the stock items on the back of some of those books, too. If a broker called for, say, stocks or bonds, he had to sell, we made a notation in the back.

Q. And have you brought the appropriate day book page with you? A. Yes, I have. [338]

* * *

Q. (By Mr. Lockley): Can you recall the substance of the conversation?

A. Well, it still related to the herb which Dr. Lee had to sell which was very expensive. It took a long time to grow in China; that is why it was expensive, he told us, and to help her and speed her

(Testimony of Ila High.)

recovery and probably guarantee that she would live twenty years. He could give her a super formula of this, and that is the gist of it. In other words, he could help her, or guarantee she would live a long time.

Q. Did he guarantee any specific period of time?

A. Twenty years.

Q. He guaranteed that she could live for 20 years. Were any notes made during the course of that conversation? [339]

A. Yes. Mrs. Cavell wrote them on a little white piece of paper, and she herself took it back to the office, it is her handwriting right in the back of the book, copying that. And I saved the piece that she copied it off of and fastened it to that sheet.

Q. First then, there was a little piece of white paper? A. Yes.

Q. On which she made notes during the course of the conversation?

A. During the course of the conversation.

Q. And then she transcribed the substance of those notes to a more permanent record?

A. The back of this 1950, what we call our daily cash book.

Mr. Pierce: It will be understood, so I won't be constantly interjecting to make objections, that my same objection goes to this entire conversation?

The Court: Overruled.

Q. (By Mr. Lockley): I show you Exhibit No. 32 for Identification and ask you if you can identify that document? A. Yes.

(Testimony of Ila High.)

Q. And what is it?

A. It is a notation of the payments that Dr. Lee would receive providing we—Mrs. Cavell accepted his offer or his—what would you say—treatments of this super herbs that were expensive to help her to live and keep her in [340] good health. [341]

* * *

Q. Now if you examine Exhibit No. 32, does that refresh your recollection as to the full contents of the conversation that you had with Dr. Lee?

A. Yes.

Q. Well, now, without testifying then from what this document says, will you go through it, and as you read each portion to yourself will you testify from your recollection as it is refreshed as to what was said?

A. Well, he gave—he gave different proportions he could use. He gave a half and half; he gave two-thirds and one-third; he had what he called an external fluid and an internal fluid. He gave also a synthetic. He said he had a synthetic one he could use, which was around \$75,000, and in giving this it depended upon how much of that herb he used, how fine she would feel and how long she would live. And he also gave different ways that she could pay it. We were given three different ways to take care of it, or three different—what did I say—prices, I guess would be the word.

Q. And what was that conversation concerning the method of payment and the amount of payment?

(Testimony of Ila High.)

A. Yes, the last one he gave was to be paid 15,000 one year; that would be 1950; 15——

Q. Let's confine ourselves first to your first conversation [347] of September 26th.

A. Is it all right if I look at this?

Q. Yes; you go ahead and look at it to refresh your recollection.

A. O.K. O.K. He had what he called the super—I don't know what proportions that was—for 327,500. He had what he called the half and half, and I think the half and half, in my mind, is the internal and the external fluid, for 245,000.

The Court: What do you mean, 245,000? Was that the price? A. Yes, \$245,000.

Q. Price?

A. Yes, price. This is money that we would—Mrs. Cavell would pay Dr. Lee for these treatments or this formula or herb, whatever is the right word. Then he also said that he had another one for 268,500, and it could be made in three payments over a period of five months. He gave her two ways that day—or three ways, I guess you would say, we could do it. Now Mrs. Cavell has written down here—in other words, a third of \$268,500 that he wanted to be made in three payments, she has down \$89,500. I guess that multiplied by three would give that; I haven't done it. She has here a third—a lot of this is just—a third of 245,000—evidently he might have mentioned it could be made—she [348] has written in underneath there and copied it better—it could be made in three payments—or every five

(Testimony of Ila High.)

months, gives 89,500, and along with that, instead of paying the hundred a week, she would pay \$50 a week or \$35 a week she might make it. We was still to keep paying by the week as well as this large sum for this formula.

Then on October 10th when we went back, we were to keep paying the hundred dollars a week; we were to pay \$15,000 in 1950. That would take in the external Fluid double strength and internal fluid a quarter; then in 1951 pay 15,000; in 1952 he give us a figure of—this 268,500, but he was to charge 18,000 more for what he called a fluid mix. The full total that time would be 286,500. If we took the 30,000 off—that would be the 15,000 she would pay in 1950 and the 15,000 she would pay in 1951, why, then at that time in 1952 we would owe a balance of \$256,500. In other words, we could pay it in three years. That was for what he called the super, triple strength.

Q. Were there any other conversations with him relating to the taking of medicine after the October 10th date?

A. No. We went back on the 17th and Mrs. Cavell told him—we took with us the same payments, the hundred which you just read a while ago and the 1100, and she told him she would think it over but she didn't think she would accept; that if she ever should, she would let him know. It [349] was never accepted.

Q. Now going back to the date of October 3rd

(Testimony of Ila High.)

when Mr. Phelps was present—— A. Yes.

Q. ——can you recall the conversation that took place in Mr. Phelps' presence?

A. Well, not the exact words, but it was that he recommended Dr. Lee. He told us how much Dr. Lee had helped him, how he didn't believe that he would be alive if it hadn't been for Dr. Lee, and he told us it is very expensive but it is worth it because, he said, "I feel he has saved my life." And he gave us—of course, I don't remember the exact figures, but they were fabulous at the time to hear what he had paid him—or he didn't give exact figures but we got the impression——

Mr. Pierce: I am going to object—is this conversation in the presence of——

A. Of Mrs. Cavell, myself, Dr. Lee and C. Phelps.

The Court: What was the date, approximately?

A. October the 3rd. The reason I know, Judge Harris, I have it written here in pencil in my book, or I wouldn't know.

The Court: Very well.

Q. (By Mr. Lockley): You don't recall at the present time how much money Mr. Phelps said he had paid Dr. Lee? [350]

A. No, but I just have it in my mind between 80 and 125 thousand, but I wouldn't want to say for sure. I just came away with a fabulous sum in my mind. I don't know that Dr. Phelps told us or Dr. Lee.

Q. Subsequent to the time you ceased going to

(Testimony of Ila High.)

see Dr. Lee with Mrs. Cavell, did you ever have any other meeting with Dr. Lee?

A. He appeared in the office on March the 19th, 1954.

Q. And where was that?

A. In Grace Cavell's office at the Hotel Cavell, Modesto.

Q. And was anyone with him?

A. No one in the office with him.

Q. Who else was present besides the doctor?

A. He came in to see Mrs. Cavell; I had gone home, it was after office hours, and Mrs. Cavell called me at home and I went back in again—I lived four miles out in the country and I went back in again and the three of us talked in her office.

Q. Now what was the substance of that conversation?

A. Well, Dr. Lee wanted to see our records which we had shown to the Federal Agent, Mr. Kerdus, which I let him see and he copied. That is this book right here. And he wanted Mrs. Cavell to say that we had seen him hand this cash to another person.

Mr. Pierce: If the Court please, may we have the [351] conversation instead of characterizations? I realize it is very difficult for the witness to distinguish between the two.

The Court: Yes; give the substance of the conversation as to what the doctor asked you, if he asked you anything, what you represented or said to him, and what Mrs. Cavell said.

A. Oh, well, that is what I am trying to do.

(Testimony of Ila High.)

The Court: Very well.

A. I guess it's not clear. I was trying to say that he wanted Mrs. Cavell if she were called—if she was called into court to say that she saw—we saw him hand this cash to another person. And Mrs. Cavell told him that she wouldn't lie for him, but that she would say he had helped her and that he had told us that we were paying him this extra cash to hand to a person for these herbs.

Q. (By Mr. Lockley): Did you actually see the defendant hand any money to anyone else?

A. No.

Q. Was there any more conversation on that date that you can recall?

A. You mean relative to payment or something?

Q. Well, of any nature whatsoever.

A. Well, no, only in this way. I can't remember all exact except he wanted, as I say, Mrs. Cavell to say this, and he seemed very perturbed that I had these pencil figures [352] here of that cash. He said, "I wanted you not make that record." And I said, "Well, I wouldn't call that a record in pencil figures. That's for my information." And he got quite perturbed. Before he was through he was crying and told us that he had lied to his attorney and accountant and he knew he would be going to jail on account of that. [353]

* * *

JOHN FERNANDEZ

called as a witness on behalf of the government;
sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury.

A. John Fernandez.

The Clerk: F-e-r-n-a-n-d-e-z? A. Yes.

The Clerk: And your address?

A. 3138 Landpark Drive.

The Clerk: That is where?

A. Sacramento.

The Clerk: Your occupation?

A. Building contractor. [409]

Direct Examination

By Mr. Lockley:

* * *

Q. And where did you meet Mr. Lee for the first time? A. In his office.

Q. And why did you go to see him?

A. I was kind of sick—very sick.

Q. You went to consult him in his office because of your physical condition? A. Yes, sir.

Q. Did he diagnose your physical condition at that time? A. Yes, sir.

Q. What did he do?

A. Well, he took my blood pressure and examined my urine.

Q. Anything else? A. That is about it.

Q. Did he give you any prescription or any prognosis? A. No prescriptions. [411]

* * *

(Testimony of John Fernandez.)

Q. (By Mr. Lockley): How did you know, Mr. Fernandez, what amount of money to take to Dr. Lee?

A. Well, he asked me for a certain amount of money.

Q. How soon before the actual delivery of the money to him [421] did you have a conversation with him with respect to the amount of money you were to deliver?

A. Well, he would ask me, like, say, this afternoon, and I would take it the next day.

Q. You were seeing him daily, is that it?

A. Yes.

Q. Except on week ends? A. Yes.

Q. I show you Exhibit 39 for Identification and ask you if you can identify that document?

The Court: Pardon me, what was the last one? I didn't hear that.

Mr. Lockley: Exhibit 39 for Identification.

The Court: All right.

The Witness: Yes, sir.

Q. (By Mr. Lockley): Are you able to identify that? A. Yes.

Q. What is it? A. A check for \$15,000.

Q. To whom is it drawn?

A. Well, it was drawn to me and I gave him the money.

Q. What did you do with the check after you wrote it?

A. Took it down to the bank and cashed it.

Q. Then what did you do?

(Testimony of John Fernandez.)

A. Took the money to Dr. Lee. [422]

Q. And where did you pay it to him?

A. In his office.

Q. Was anyone else present? A. No, sir.

Q. Did you get any receipt? A. No, sir.

Q. How did you know you were to bring him \$15,000? A. He asked me for \$15,000.

Q. When did he ask you?

A. The day before.

Q. Did he say why he wanted \$15,000?

A. Well, he said he had to get some herbs from China or something, and he had to get the money first before he could get it.

Q. Did you subsequently receive any herbs?

A. Well, all I got was that tea. Always tasted the same to me.

Q. If there was any difference you didn't know it? A. I didn't. [423]

* * *

Q. (By Mr. Lockley): Mr. Fernandez, I show you Exhibit 40, for identification, and ask you if you can identify that document?

A. Yes, sir.

Q. And what does that purport to be?

A. This was drawn to cash. The money was delivered to Dr. Lee.

Q. That is a check? A. Yes, sir.

Q. Who wrote it? A. I did.

Q. Did you also cash it? A. Yes, sir.

Q. And what did you do with the money you

(Testimony of John Fernandez.)

received? A. Took it to Dr. Lee.

Mr. Lockley: I offer in evidence, your Honor please, Exhibit 40.

The Court: It may be marked in evidence.

(Whereupon Government's Exhibit No. 40 formerly for identification was received in evidence.)

Mr. Lockley: Exhibit 40 is a check, Sacramento, California, dated February 8, 1950. "Pay to the order of Cash \$22,750." Sacramento office of the American Trust Company, [425] signed John Fernandez.

Q. Mr. Fernandez, I show you Exhibit 40 and ask you if you cashed that check yourself?

A. Yes, sir, I did.

Q. And what did you do with the money, the \$27,750 that you received?

A. Took it to Dr. Lee. [426]

* * *

Mr. Lockley: I show you Exhibit 41, for identification, and ask you if you can identify that document. A. Yes, sir.

Q. And what does that purport to be?

A. A check drawn on the American Trust.

Q. And to whom is it drawn? A. To me.

Q. Did you write it yourself?

A. Yes, sir. [428]

Q. Did you cash it? A. Yes, sir.

Q. And what did you do with the money?

A. Took it to Dr. Lee.

(Testimony of John Fernandez.)

Mr. Lockley: I offer in evidence Exhibit 41.

The Court: It may be marked.

(Whereupon Government's Exhibit No. 41
for identification was received in evidence.)

Mr. Lockley: Exhibit 41 is a check, "Sacramento, California, dated March 14, 1950. Pay to the order of cash, \$22,750, drawn on the American Trust Company, Sacramento office, by John Fernandez."

Q. Did you cash that check yourself, Mr. Fernandez? A. Yes, sir.

Q. What did you do with that money?

A. I took it to Dr. Lee.

Q. Did the same thing happen at that time?
Did you count the money yourself?

A. No, sir.

Q. Just Dr. Lee counted it?

A. Yes, sir. [429]

* * *

Q. (By Mr. Lockley): I show you Exhibit 42, Mr. Fernandez, and ask you if you can identify that document? A. Yes, sir.

Q. And what does that purport to be?

A. For Dr. Lee. Money was cashed at the bank to take to him.

Q. Was that a check drawn by you?

A. Yes, sir.

Q. Did you get money for that at the bank?

A. \$2,000, yes, sir.

Q. What did you do with the money?

(Testimony of John Fernandez.)

A. Took it to Dr. Lee.

Q. You paid it to him? A. Yes, sir.

Mr. Lockley: I offer in evidence Exhibit 42.

The Court: So ordered.

(Whereupon Government's Exhibit 42 for identification was received in evidence.)

Mr. Lockley: Exhibit 42 is a check dated April 12, 1950, by John Fernandez, "Pay to the order of cash \$2,000," on the Sacramento office of the American Trust Company.

Q. Do you have any recollection concerning the cashing of [430] that particular check, Mr. Fernandez? A. Yes, sir, I have.

Q. What did you do on that occasion?

A. I cashed the check and took it to Dr. Lee.

Q. And why did you pay him that money?

A. Because he asked me for it.

Q. Do you recall any particular denomination of bills that you received at the time?

A. No, sir, I don't.

Q. Do you recall that with respect to any of the checks that I have shown you up to now?

A. No, sir.

Mr. Lockley: May this be marked as government's Exhibit next in order for identification?

The Court: So ordered.

(Whereupon check was marked Government's Exhibit No. 43 for identification.)

Q. (By Mr. Lockley): I will show you Exhibit

(Testimony of John Fernandez.)

43, for identification, and ask you if you can identify that document? A. Yes, sir.

Q. And what does that purport to be?

A. Well, I cashed that check at the bank and delivered the money to Dr. Lee.

Q. Is that a check in your handwriting?

A. Yes, sir. [431]

Q. Did you cash it? A. Yes, sir.

Q. Did you take the money to Dr. Lee yourself?

A. Yes, sir.

Q. Did you pay it over to him?

A. Yes, sir.

Mr. Lockley: I offer in evidence Exhibit 43.

The Court: So ordered.

(Whereupon Exhibit No. 43 formerly for identification was received in evidence.)

Mr. Lockley: Exhibit No. 43 is a check dated May 9, 1950, drawn to cash, \$2,000, signed by John Fernandez, Sacramento office of the American Trust Company.

Q. With respect to Exhibit 43, Mr. Fernandez, how did you know to get \$2,000 by that check?

A. Well, he asked me for \$2,000.

Q. Did you have a conversation with him with respect to each one of these checks that I have shown you prior to the time you drew the check?

A. He always told me in order to get this medicine he had to have this medicine in cash in advance.

Q. Did he always tell you how much he needed

(Testimony of John Fernandez.)

in cash? A. Yes.

Q. Was there any lump sum total that you were to pay him over any particular period of [432] time?

A. Well, he started with a hundred and twenty thousand dollars.

Q. Were there any other figures mentioned?

A. Not that I remember.

Mr. Johnston: Excuse me, I will object as no foundation has been laid.

Q. (By Mr. Lockley): When was that \$120,000 figure mentioned?

The Court: The answer may be stricken. Will you lay a foundation?

Q. (By Mr. Lockley): When was the first \$120,000 figure mentioned?

A. When I first talked to him.

Q. That was back in 1949, then?

A. Yes, sir.

Q. Was anybody else present? A. No, sir.

Q. Was there any discussion as to what he would do for you for this \$120,000?

A. Well, he said for \$120,000 he could put me 80 per cent normal.

Q. Did he say how?

A. With this medicine. I forgot the name of the medicine. He mentioned the name, but I don't remember.

Mr. Lockley: I offer for identification this document. [433]

The Court: It may be marked.

(Testimony of John Fernandez.)

(Whereupon check referred to above was marked Government's Exhibit No. 44 for identification.)

The Court: Were there any progressive payments indicated, Mr. Lockley? Will you develop that with respect to these payments, whether they were on account of an obligation or currently made. It isn't clear in my mind. Were they part and parcel of a payment made approximating \$120,000?

Q. (By Mr. Lockley): Mr. Fernandez, did you have a total that you were leading up to to pay off by means of these various checks?

A. Well, I never did expect to pay him \$120,000.

Mr. Lockley: Objected to as not responsive, if the Court please.

The Court: Yes, it may go out.

Q. (By Mr. Lockley): Did you have an understanding at any time with Dr. Lee as to the sum total you were to pay him?

A. No. The \$120,000, that is the only thing I remember.

Q. Did you know, was there any reason for the varying amounts which you have mentioned on these checks?

A. The reason for it was in order to get the medicine.

Q. I notice that the first of these checks is a thousand dollars on January 6. A week later, on January 13th, it is \$15,000. On February 8th it is

(Testimony of John Fernandez.)

\$22,750. On March 14th it is \$2,750. On April 12th it is \$2,000, and on May 9th it is [434] \$2,000.

Now, is there any explanation that you know for the fact that those amounts went up the scale from 1,000, 15000, 22,750, and then back down again to \$2,000? A. No, I don't.

Q. You just were told how much to pay on each occasion? A. Yes, sir.

Q. Did you ever bargain with Dr. Lee as to the amount you would pay him? A. No, sir.

The Court: How much medicine did he receive currently as he made these progressive payments?

Q. (By Mr. Lockley): Did you receive any more medicine at the times you made the larger payments of \$15,000 and \$22,750 than when you made the lesser payments of one and two thousand dollars?

A. All I received right along was a cup of herb or tea or whatever you call it.

Q. You received the same amount of tea each day? A. Yes, sir.

Q. So far as you know, were there any different ingredients in the tea?

A. So far as I know, there wasn't.

Q. I show you Exhibit No. 44——

The Court: Was that tea served in the office or did [435] he take it away with him?

The Witness: Over the week end he gave me a couple of bottles of tea to take at home.

The Court: Otherwise the tea was served in the office?

A. Yes, sir.

(Testimony of John Fernandez.)

The Court: And at the time the tea was served, was a check mark made on a little card? Do you recall that?

A. No, sir.

Q. (By Mr. Lockley): Did you see any records of any sort that were maintained by Dr. Lee?

A. No, sir.

Q. Did you ever receive any bill from him?

A. No, sir.

Q. Any receipt? A. No, sir. [436]

* * *

Mr. Johnston: I am going to contend that the defendant never got the money.

The Court: You ask me to make rulings here on abstractions. You ask me to require persons who have been allegedly preyed upon to audit their accounts at a moment's notice. I think the Court is entitled to know whether or not you will admit that the monies came into the doctor's office.

Mr. Johnston: If the Court please, our position is that these alleged cash payments never came into the doctor's office and never touched his hands. [500]

* * *

CHARLES R. PHELPS

called as a witness on behalf of the Government,
sworn.

The Clerk: Please state your name, your address and your occupation to the Court and to the jury. [530]

A. Charles R. Phelps.

The Clerk: P-h-e-l-p-s?

A. P-h-e-l-p-s.

The Clerk: Your address?

A. 539 Merritt Avenue, Oakland, California.

The Clerk: Your occupation?

A. Occupation, life insurance agent.

Direct Examination

By Mr. Lockley: [531]

* * *

Q. In 1950 how frequently did you see him?

A. I saw him almost every day.

Q. And how often did your wife see him, if you know?

A. Not too often. I would take the medicine home to her, and she wouldn't see him but perhaps once a month, something like that.

Q. And what was the nature of services or medication that he gave you during 1950?

A. Well, I took tea every day—an herb. I drank a cupful every day in his place. I took it there because it was more convenient. I was located downtown and it was easier to go down to his office to

(Testimony of Charles R. Phelps.)

get it than go home to get it. And it tasted better when it was warm, anyway.

Q. He warmed it up for you, did he?

A. Oh, yes, it was warm.

Q. Do you know if the defendant kept any books and records?

A. Do I know that he did?

Q. Yes.

A. No, I know nothing about that.

Q. Did you have any arrangement with him for the payment of these daily visits?

A. My payments to him?

Q. Yes.

A. Yes, I paid him 25.65 each week. [533]

* * *

Q. (By Mr. Lockley): Now, Mr. Phelps, in addition to the checks for \$25.60 did you make any other payments to Dr. Lee during the year 1950?

A. I made a few cash payments to Dr. Lee during 1950.

Q. And for what purpose did you make the cash payments? A. For additional medicines.

Q. What type of medicine, if any, did you receive for the cash payments?

A. Well, it would be difficult for me to describe. Frankly, I know very little about the medicines that I took.

Q. Well, was it apparently, to your knowledge, a different type of medicine than the daily herbage tea you were drinking? A. Yes, it was.

(Testimony of Charles R. Phelps.)

Q. Can you describe the container in which it was kept?

A. Well, it was in little bottles, little one and two ounce bottles with a dropper.

Q. There was a dropper in the bottle?

A. That is right.

Q. How did Dr. Lee prescribe that you take that medicine?

A. So many drops in a glass of water a day, twice a day perhaps.

Q. Do you recall how many bottles you received from the doctor at any one time?

A. Oh, I do not. Perhaps, oh, a dozen bottles at one [538] time. Perhaps only six. I am not sure.

Q. Do you know how much it cost per bottle?

A. I do not. I do not.

Q. Prior to 1950 had you purchased any of those bottles of herbs from Dr. Lee?

A. Prior to the year 1950?

Q. Yes. A. Yes.

Q. Do you recall when you made the purchase?

A. A number of times.

Mr. Johnston: Objected to, if the Court please, on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

The witness: Perhaps for a number of years prior to 1950.

Q. (By Mr. Lockley): How did you pay for the medicine that you purchased prior to 1950 which was not the daily herb tea?

(Testimony of Charles R. Phelps.)

Mr. Johnston: Same objection, if the Court please.

The Court: What is the purpose of this?

Mr. Lockley: I think this goes to scheme, plan, design and course of conduct.

The Court: Objection overruled.

The Witness: I paid for them in cash.

Q. (By Mr. Lockley): Was there any reason for paying for [539] them by cash?

A. It was the only way I could secure them.

Q. Did you have any conversation with anyone relative to the manner of payment?

A. Dr. Lee asked for cash.

Q. And are you able to fit the approximate date that you had such a conversation?

A. I couldn't say that. But I know that it went on for a number of years prior to 1950. I couldn't fix it by dates, Mr. Lockley, but it went on for a number of years.

Q. And do you have any knowledge of the amount of currency you paid him prior to 1950 for this medicine?

Mr. Johnston: Objected to, if the Court please, on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: It was considerable.

Q. (By Mr. Lockley): Well, will you tell us what you mean by considerable?

A. I have no record of it and—I really have no

(Testimony of Charles R. Phelps.)

record of it. Those are some of the things I wish to forget. I suppose it was twenty or thirty thousand dollars. [540]

* * *

Q. Now I show you Exhibit No. 34, Mr. Phelps, which is a check dated October 25th, 1949, and drawn to Dr. C. C. Lee and signed by Mr. Lucas for \$1,500 and ask if you will examine particularly the reverse side bearing the endorsements and ask if you have ever seen that before?

A. Yes, I have seen this check.

Q. And where did you first see it?

A. Dr. Lee gave me this check and asked me if I would cash it for him. Mr. Lucas I had recommended to Dr. Lee. And he said, "You know him and would you mind cashing the check?" And I said, "All right, I will."

Q. And what did you do?

A. I gave it to my secretary. The next time she made a deposit she cashed this check and brought me the money and I gave it to Dr. Lee. [554]

* * *

Q. Have you had any discussion with Dr. Lee concerning your testimony in the event you might be called before the revenue agents?

A. Yes.

Q. And when was that?

A. Well, that was several years ago. It was three or four years ago, I would say, maybe two and a half years ago.

Q. Where was it?

A. In his office.

(Testimony of Charles R. Phelps.)

Q. And who was present?

A. Nobody but Dr. Lee and myself.

Q. Were you a patient of his at that time?

A. I was.

Q. Had you gone there for any special purpose?

A. No. I had gone there for my medicine, my regular medicine, which I took every day.

Q. Would you tell us what the conversation was on that occasion?

A. Well, he told me that the situation—he told me that the Internal Revenue was examining into his affairs and asked [555] if they called on me would I report to them that I had paid so much in check only and no cash. [555A]

* * *

JOHN H. KERDUS

called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name, your address, and your calling to the Court and to the jury.

A. John H. Kerdus—K-e-r-d-u-s. I am a special agent of the Internal Revenue service stationed at Sacramento, California.

Direct Examination

By Mr. Lockley: [579]

* * *

Q. Now, did you ever see any of the books and records of Dr. Lee? A. I did not.

(Testimony of John H. Kerdus.)

Q. And how did you go about conducting your investigation?

A. We called upon various offices in the Sacramento area, that is, county offices, city offices, state offices and some federal offices, looking for information as to the Doctor's background, his business, property he had acquired; particularly in the recorder's office for information as property which Dr. Lee had acquired in the year 1950, and of course during the investigation for other years also.

Q. Did you attempt to ascertain who were Dr. Lee's clients or patients?

A. Yes.

Q. And how did you go about that?

A. Inasmuch as the books and records were not available, we worked mainly through the banks in Sacramento. We went to the various banks and asked for information as to whether or not Dr. Lee and his family had accounts there.

When we had found the accounts, we transcribed the accounts, the savings account, commercial accounts, and from these transcripts then we went to the deposit tag showing [581] the makeup of the deposits to the accounts, that is, currency or coin or checks.

Now, from that information we could determine—Well, first of all, a deposit tag shows in most instances, anyway, the identifying number of the bank upon which it is drawn. From that number we were able to determine the name of the bank upon which the check was drawn.

(Testimony of John H. Kerdus.)

Now, in the bank records the out-of-town checks are Recordaked before they are sent back to the bank upon which the check is drawn. Therefore, on all out-of-town items we could try and determine the name of the person who had drawn the check by going to the Recordak film, running the film, and finally in most instances for those checks that we looked for we were able to find an actual picture of the check which had been deposited.

After we had obtained the name, we either went to the bank upon which it was drawn to find out the identity of the person who had drawn the check, or we went to the city directory or telephone directory to find the address of the person. And from that information then we went to the person and talked to them and found out the stories. [582]

* * *

Q. So far as you know, were the amounts of deductions on the income tax return substantially correct as discovered by your investigation?

A. So far as we could tell, yes, sir. [584]

* * *

AUGUSTUS V. BRADY

called as a witness on behalf of the Government,
sworn:

The Clerk: Please state your name and your calling to the Court and jury.

A. Augustus V. Brady, B-r-a-d-y. I am a Technical Advisor to the Regional Counsel, Treasury Department.

(Testimony of Augustus V. Brady.)

Direct Examination

By Mr. Lockley:

Q. Mr. Brady, what are your duties as Technical Advisor to the Regional Counsel, Treasury Department?

A. As a Technical Advisor to the Regional Counsel's office I assist the Attorneys in reviewing cases recommended by the Special Agents offices for criminal prosecution.

Q. And do you make computations of income tax? A. Yes, sir, I do, when requested.

Q. What is the extent of your education?

A. Well, going back many years before the First World War, I was in the New York University for a while. Then I went in the Navy. When I came out of the service I took all the correspondence course that the Bureau had offered in regard to accounting through cost accounting. I took approximately six years of accounting at either night school or by correspondence through cost accounting.

Q. Do you have an accountant's license?

A. Public accountant's license, yes. [586]

Q. Have you ever qualified as an expert witness in any income tax cases? A. Yes, I have.

Q. In about how many cases?

A. Well, I have testified in approximately I would say, more than 15 cases for the past seven years.

Q. In what courts?

(Testimony of Augustus V. Brady.)

A. In the United States Federal Court here in San Francisco and Nevada.

Q. You have been present through the course of the trial to this date?

A. Yes, sir, I have.

Q. And have you examined all of the documents which have been admitted in evidence?

A. I have reviewed them at one time or another, yes.

Q. And have you also besides hearing the testimony have you seen it in its transcribed form in the record?

A. Yes, sir. I have read the testimony each evening, each morning, the previous day's testimony.

Q. Now as a result of that, have you made a computation of the net income received by Dr. Carl C. Lee during the year 1950?

A. Mr. Lockley, I made a computation which I considered a computation of net income based on a summary of receipts from the testimony and exhibits in evidence. [587]

Q. And have you allowed any business expenses for cost of goods sold or other expenses against net income?

A. Yes, what was claimed on the return we allowed.

Q. And how did you determine the amount of deductions of a personal nature for contributions, interest, taxes and so forth?

A. Well, the standard deduction was claimed on a return and we allowed the same amount.

(Testimony of Augustus V. Brady.)

Q. And how many exemptions have you allowed?

A. There were five exemptions claimed on the return and we allowed the same amount.

Q. In your computation have you made any changes in the figures shown on the income tax return?

A. No. I took the income as shown on the return, the deductions shown on the return, and just added to the business income the difference between the receipts testified to here from exhibits and testimony and receipts as shown on the income tax return.

Q. So your initial change then was in the gross income received? A. Yes, sir.

Q. And you have allowed all of the deductions, exemptions, credits claimed on the original income tax return of the defendant for 1950?

A. Yes, sir, I have. [588]

Mr. Johnston: If the Court please, I am going to make this objection but apparently counsel is asking a hypothetical question of the witness but he has not stated the assumption on which the question is based. I think it should be handled in the customary manner.

Mr. Lockley: I haven't gotten to that point yet, your Honor.

The Court: That is your computation?

The Witness: My summary.

Mr. Lockley: May these computations be marked for identification, your Honor?

The Court: So ordered, they may be marked.

(Testimony of Augustus V. Brady.)

(Whereupon, the computations referred to above were marked as Government's Exhibit 52 for identification.)

Mr. Lockley: With your Honor's permission I would like to place some of these figures on the blackboard as the witness testifies to them.

The Clerk: United States Exhibit No. 52 for identification.

Mr. Johnston: May we see that?

Q. (By Mr. Lockley): Have you made a computation then of the receipts, total receipts from the business or profession received by Dr. Lee during the year 1950?

Mr. Johnston: I will object to it if the Court please as that calls for hearsay testimony. The man has no knowledge [589] of the receipts that Dr. Lee had in 1950.

Mr. Lockley: I am merely asking him a preliminary question which may be answered yes or no.

The Court: He may answer that.

The Witness: Yes I have.

Q. (By Mr. Lockley): And from what source did you obtain the information for making that computation?

A. I made a summary of receipts from the testimony and exhibits here in evidence.

Q. And can you give me a breakdown of the manner in which you arrived at the total figure of gross receipts from business or profession for the

(Testimony of Augustus V. Brady.)

year 1950? A. Yes, I can.

Q. Will you give them to me briefly?

A. I have a total cash receipts of \$80,000.

Mr. Johnston: I am going to object, your Honor that this again is hearsay testimony. I have no question about Mr. Brady's qualifications and I assume that all he has done is total up a list of figures here and it is purely a mathematical computation, why, I have no objection to stating the total.

The Court: I assume it purports to be a summary or summation?

The Witness: Yes, sir.

The Court: Very well, I will allow it. [590]

Q. (By Mr. Lockley): What is the total figure of cash receipts?

A. I have \$80,333 and no cents.

The Court: Three hundred thirty-three? Three hundred thirty, three hundred thirty?

A. Yes. Amounts received by checks \$10,293.35, making a total receipts from 11 patients of \$90,-623.35.

Q. (By Mr. Lockley): Now I show you Exhibit No. 1, Mr. Brady, and ask if you have examined this before?

The Court: Pardon me, you said 11 patients?

The Witness: Eleven patients, yes, your Honor.

Q. (By Mr. Lockley): Have you examined Exhibit No. 1, the income tax return of the Defendant for the year 1950? A. Yes, sir.

Q. And what is the amount of gross receipts from income of profession reported on that?

(Testimony of Augustus V. Brady.)

A. \$15,887.75.

Q. You made that calculation of the difference between the amount reported?

A. Yes, I did. The difference is \$74,735.60.

Q. Now the \$90,623.35, how did you characterize that, Mr. Brady?

A. Well, that is a summary of the receipts for the year 1950 from the 11 patients who testified here and also Mrs. High who testified for Mrs. Corvell. [591]

Q. That would be gross receipts?

A. That is gross receipts, yes.

Q. Now what did you allow in the nature of deduction, credits, and exemptions against that figure?

A. Well, the cost of goods sold as shown on the income tax return is \$2,003.31. That I did not disturb.

Q. There was also other business deductions of \$2,957.35?

Mr. Johnston: If the Court please, may it be understood that our objection based on hearsay goes to this entire line of testimony. The objection that we make is based on the theory that these figures, once that they are stated authoritatively as if they were stated as a fact are stated as an independent exhibit in existence, which I think is unfair.

The Court: All of this testimony as I gather it and view it is predicated upon either testimony of-

(Testimony of Augustus V. Brady.)

ferred in this court or written records including the return of the credit, is that correct?

The Witness: Yes, your Honor.

Mr. Lockley: I have no objection if your Honor cares to do so to give the jury the instruction at this time concerning the weight to be given to the testimony of an expert.

Mr. Johnston: If the Court please, this testimony is purely hypothetical and there has not been a single hypothetical [592] question asked or a single assumption stated as such.

The Court: Thus far the testimony has been predicated upon the record, hasn't it?

Mr. Lockley: That is correct.

The Court: From the Government's theory?

Mr. Lockley: That is correct.

The Court: The objection is overruled.

Q. (By Mr. Lockley): What are the total amounts of business deductions and other deductions, which are stated on the income tax return, to arrive at the net income, Mr. Brady?

A. Yes, sir.

Q. What are they?

A. Well, I mentioned the cost of goods sold as \$2,003.31 and other business deductions of \$2,-957.35.

Q. And what is the net income figure that you arrived at from this fact?

Mr. Johnston: If the Court please, I will try not to interrupt again but may the record also show

(Testimony of Augustus V. Brady.)

that our objection is based upon the ground that this is opinion testimony?

The Court: Overruled.

The Witness: While deducting the cost of goods sold as claimed on the return and other business deductions claimed on the return I arrived at a business income of \$85,662.69.

Q. (By Mr. Lockley): And then did you allow the personal deductions against that figure, against the gross income [593] figure?

A. Yes. The standard deduction of \$1,000 as was claimed on the return.

Q. And what is the amount of net income?

A. The net income is \$84,662.69.

Q. Now assuming, Mr. Brady, that Dr. Lee reported the amount of his deductions, exemptions and credits correctly on his income tax return, that is of both a personal and business nature, and that he had a net income of \$84,662.69, have you computed the amount of tax that would be owing upon that net income?

A. Yes, sir, I have.

Q. And what is that amount of tax?

A. Well, the total tax liability in a joint return basis would be \$36,938.80.

Q. And what is the amount of tax reported on Exhibit 1 the income tax return?

A. \$1,282.

Mr. Lockley: That's all.

Mr. Johnston: No cross-examination.

The Court: Do you have any cross-examination?

Mr. Johnston: No cross-examination, your Honor.

The Court: Very well.

Mr. Lockley: The Government rests at this time.

The Court: Has the summary been offered in evidence? [594]

Mr. Lockley: Your Honor, I have not offered it in evidence. I will do so if counsel cares me to do so, but I have just had it marked for identification at this time.

Mr. Johnston: I am not going to offer it. I am objecting to it. You offer it, Mr. Lockley.

Mr. Lockley: I am not going to offer it.

The Court: Very well.

Do not erase the board, please.

Ladies and gentlemen, we have reached the adjournment hour. This being Friday the Court will take the regular adjournment until Monday morning at 10:00 o'clock. The same admonition not to discuss the case nor form nor express an opinion until the matter is submitted and not to read news accounts, if there be any news accounts, of this trial.

The Defense Counsel on Monday will make his opening statement and go forward with the defense.

(Thereupon, an adjournment was taken until Monday morning at 10:00 o'clock.) [595]

Monday, December 12, 1955—10:00 A.M.

The Clerk: United States of America vs. Carl C. Lee, further trial.

The Court: Do you have some matters you desire to take up with the Court outside the presence of the jury?

Mr. Johnston: Yes, your Honor.

The Court: All right.

(The following proceedings were had outside the presence of the jury:)

Mr. Johnston: The Court will recall that we had pending a motion to dismiss the indictment, and I think it might be appropriate for the Court to rule on that motion at the present time. I have nothing further to offer in support of the motion.

The Court: The motion will be denied.

Mr. Johnston: At this time, if your Honor please, I would like to make a motion for judgment of acquittal, and I will not argue the motion, unless the Court desires to hear argument.

The Court: There is no occasion, unless you desire to submit authorities or to give whatever views you may have on the question, or any supporting statements.

Mr. Johnston: No, I do not, your Honor.

The Court: The motion is denied.

Mr. Johnston: I would like also at this time to make [597] a motion to strike that portion of the witness Brady's testimony beginning in the transcript at page 590, line 15, continuing to page 594, line 18, on the ground that the testimony is hearsay; and on the further ground that it is opinion testimony which was not prefaced by the proper type of hypothetical question.

The Court: Mr. Lockley?

Mr. Lockley: Your Honor please, I think that does not call for an opinion so much as it calls

merely for a mathematical computation. That is all that the witness Brady did. I don't think that that enters the realm of expert testimony to such an extent that it is necessary to lay the ordinary foundation by asking hypothetical questions.

The witness Brady testified that he had determined these computations, which were merely additions of figures, from all of the testimony and documents which are in existence here.

The jury could, of course, have arrived at the very same results themselves by examination of the documents, and the sole purpose of Mr. Brady's testimony, which does not in any way encroach upon the province of the jury, was to more or less assist the jury in what would otherwise have been a somewhat practically difficult matter; that is, segregating from these rather voluminous checks the ones which related to payments to Dr. Lee in currency and ones that related to payments by check to him, and then totaling up the [598] additions.

The Court: The motion to strike is denied. Are there any other motions or matters before the Court at the present time? [599]

* * *

The Clerk: United States of America v. Carl C. Lee, further trial.

The Court: Is it stipulated that the jurors are present, gentlemen, including the alternate juror?

Mr. Lockley: So stipulated.

Mr. Johnston: So stipulated, your Honor.

The Court: Under the rules the alternate juror

is to be discharged at the time or immediately prior to the time the jury retires for its deliberations. Therefore, the alternate juror will remain during the instructions of the Court and until the exceptions, if any, are taken, and then I will excuse the alternate juror, it appearing that all the other jurors are present, so there are thirteen in the box.

May that be stipulated, too, gentlemen?

Mr. Lockley: Yes, your Honor.

Mr. Johnston: Yes, your Honor.

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen, we have arrived at that period in the trial wherein the Court, under the law, instructs you with respect to the legal principles involved in this case.

I might say a word in a preliminary sense concerning the instructions. Many of you ladies and gentlemen are trying your first case, and it is a criminal case. The instructions given to you by the Court represent the embodiment of instructions proffered and tendered by the government as well as by [2*] the defendant to their counsel, and the instructions are processed by the Court as well as by the attorneys. The attorneys are officers of this court. And after processing and refinement, the results are given to you as a sort of distillate, the result of sometimes many hours of work.

You are bound to accept my statements of the law. If any principles I announce to you are in-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

correct, there are higher courts that are duty-bound to exercise supervision over this Court. We have in our system or jurisprudence a very evenly balanced system of checks and balances.

The Court told you at the very threshold of the case that you are the triers of the facts. The Court does not intrude itself in the duties that are cast upon you. If during the trial of this case I said anything, either expressly or inferentially, that seemed to reflect upon any of the parties to this action, I ask you to dismiss the same from your minds. I do not intend to convey to you my impression as to the facts. That is exclusively your province. I attempt in the trial of cases to remain within my exclusive province, and that is to announce to you the law and to rule upon the admissibility of evidence during the course of the trial.

You are to be governed solely by the evidence introduced in the case. And the law will not permit jurors to be governed by sentiment, conjecture, sympathy, passion or prejudice. A verdict founded upon sentiments of pity for the accused, or [3] upon public opinion or public feeling, or upon passion or prejudice, or upon conjecture or suspicion or surmise will be a false verdict.

You should keep in mind the importance to the accused of the result of your deliberations, and be just to him as well as to the people of the United States. Both the public and the defendant have a right to demand and they do demand and expect that you will carefully and dispassionately weigh and consider the evidence and the law of the case

and give each your conscientious judgment, and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The Court has not attempted to embody all the law applicable to the case in any one instruction, but in considering any instruction you must construe it in the light of and in harmony with every other instruction given; and so considering and construing, apply the principles enunciated to all the evidence admitted upon the trial.

I ask you to distinguish carefully between the facts testified to by the witnesses and statements made by the attorneys in their arguments, or representations as to what facts have been or are to be proved; and if there is a variance between the two, you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified to by the witnesses. And you are to remember that [4] statements of counsel in their arguments or representations are not evidence in the case.

You may recall that at the opening statements of the arguments I admonished and directed you to weigh the arguments in the light of the evidence. If counsel upon either side have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and you must look entirely to the proof in ascertaining what the facts are.

On the other hand, if counsel have stipulated or agreed to certain facts, you are to regard the facts

so stipulated and agreed to by counsel as being constructively proved.

You may recall in several instances wherein counsel on both sides agreed and stipulated to certain arithmetic computations to be considered as evidence, and the Court and clerk made certain notations in the records and minutes of this court.

Any testimony to which an objection was sustained by the Court, and any testimony which was ordered stricken out by me, must be wholly left out of account and disregarded by the jury.

At times throughout the trial the Court has been called upon to pass upon the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is [5] admissible is purely a question of law. In admitting evidence to which an objection has been made, the Court does not determine what weight should be given such evidence, nor does it pass upon the credibility of the witnesses.

I charge you, ladies and gentlemen, that if the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt the interpretation which will admit of the defendant's innocence and reject that which points to his guilt.

The fact that an indictment has been filed against the defendant is not to be considered by you as any

evidence of the defendant's guilt. You may recall at the time when I examined you as to your qualifications to serve as a juror, I undertook to point out that the indictment is not evidence. It is merely a legal accusation and the initiatory step in the trial of a criminal case.

The defendant, as you know, entered a plea of not guilty and therefore placed in issue all of the material allegations of the indictment, which is embraced in one count.

The indictment in this case charges a violation of Section 145(b) of Title 26, United States Code, which, so far as applicable here, reads, "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this [6] chapter shall be guilty of an offense."

The word "wilful" as used in this statute means with knowledge of one's obligation to pay a tax due and with intent to defraud the government of that tax.

It is not necessary for the government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving, and that he wilfully attempted to evade and defeat a substantial portion of the taxes alleged to have been due in the indictment.

The determination of a charge in a criminal case involves the proof of two distinct propositions:

first, that the crime charged was committed; second, that it was committed by the person accused thereof and on trial therefor. These two propositions, and every essential and material fact necessary to them, or either of them, must be established by the government beyond a reasonable doubt.

Counsel on both sides have addressed themselves to a consideration of the context of the returns filed. You as citizens, the Court as well, must at the allotted time every year return our taxes to the government, and I take it that you are all generally familiar with the forms as well as the makeup of the routine forms provided by the government. Much of [7] what I say to you now will be already within your contemplation and knowledge.

However, the first stage in arriving at the income of an individual upon which the tax is imposed, is a determination of the gross income of the individual.

Gross income is generally all gains or profits and income derived from any source whatever, whether from salary or wages, or professions, trades and businesses; from sales, from dividends, from interest, or from the transactions of any business carried on for gain or profit, except that from such gains and profits there must be excluded, under the provisions of the Revenue Acts, certain items which would properly be a part of gross income if the statute did not require their exclusion. These items are not pertinent in this particular case.

In the case of a merchandising business, gross

income means the total sales less the cost of goods sold. After having determined the gross income of an individual, the next step provided by the statute for arriving at the income upon which the tax is computed is to deduct from the so-called gross income such deduction as the statutes permit.

That is, an individual is permitted to deduct from gross income all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on his trade or business, including a reasonable allowance for salaries or other [8] compensation for personal services actually rendered such individual; also rentals for the use and possession of property connected with and used in a trade or business; also certain taxes paid by the individual in the taxable year; also losses sustained during the year for which the individual is not reimbursed by insurance, if such losses are incurred in the trade or business; other losses sustained during the year for which the individual is not reimbursed by insurance if said losses are incurred in any transaction entered into for profit, although not connected with any trade or business, and other deductions.

After such of these deductions from gross income as the individual is entitled to are made, the amount remaining is the adjusted gross income, to which reference was made during the course of defense arguments.

In determining net income, the taxpayer is permitted to deduct from adjusted gross income either the optional standard deduction fixed by law or the

amounts paid by him during the year for certain charitable contributions, interest, taxes, medical expenses, casualty losses and other miscellaneous personal deductions.

Medical expenses which may be deducted include amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body. The cost of drugs is included in the [9] expenses which are deductible.

In filing his federal income tax return for the year 1950, an individual taxpayer was entitled, but was not required—that is, it was permissive—to claim a deduction for his medical expenses not compensated by insurance or otherwise, subject to the following limitations:

1. Such expenses were deductible only to the extent that they exceeded five per cent of the taxpayer's adjusted gross income.

2. The deduction could not exceed \$1,250, multiplied by the number of exceptions allowed to the taxpayer for himself, his spouse and dependents.

3. The maximum deduction in the case of a taxpayer filing a separate return was \$2,500.

4. The maximum deduction in the case of a husband and wife filing a joint return was \$5,000.

I charge you, ladies and gentlemen, that if you find that the defendant signed his individual income tax return, you may consider that as a circumstance in determining whether he had knowledge of the contents of that return.

The defendant is presumed to be innocent of the

crime charged against him. This presumption of innocence attaches at the beginning of the trial. It has the weight and effect of evidence in the defendant's behalf, and continues to operate in the defendant's favor throughout all stages of the [10] trial. When you finally retire to the jury room to deliberate upon a verdict, it becomes your duty to consider the evidence introduced in this case in the light of this presumption. This presumption is sufficient to acquit any defendant charged with a crime unless it is overcome by evidence that satisfies your mind beyond a reasonable doubt of the guilt of the accused, and unless you are so satisfied it is your duty to find the defendant not guilty.

It is not necessary for the defendant to prove his innocence. The burden rests upon the prosecution to establish every element of crime with which a defendant charged, beyond a reasonable doubt.

Now, what is a reasonable doubt?

A reasonable doubt is what the term implies, a doubt founded upon reason. It means a doubt which is substantial and not merely shadowy. It does not mean a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance on the part of a juror to perform an unpleasant duty, nor a doubt arising out of sympathy for a defendant, or out of anything other than a candid consideration of all the evidence presented. It means a doubt which arises upon an impartial comparison and consideration of the evidence.

Without it being restated or repeated to you, ladies and gentlemen, you are to understand that

the requirement that a defendant's guilt be shown beyond a reasonable doubt is to [11] be considered in connection with and as accompanying all the instructions that are given to you. Remember that the defendant is entitled to any reasonable doubt as defined that you may have in your minds. But at the same time, also remember that if you have no such doubt, the government is entitled to a verdict.

The government must establish the guilt of a defendant beyond a reasonable doubt, as I have indicated. Proof of guilt should exclude every reasonable hypothesis of innocence, but need not go beyond that point. That is to say, the government must prove its case beyond a reasonable doubt, but the government is not required to exclude every possible hypothesis of innocence.

The reasonable doubt to which I refer, such as would entitle the defendant to an acquittal, need not necessarily arise out of or from the evidence itself, but may result or arise from a want or a lack of evidence sufficient to satisfy the mind.

To establish its case, the government must prove beyond a reasonable doubt both of the following two elements:

1. That substantial income tax was due and owing from the defendant in addition to that declared in his income tax return; and,

Second, that the defendant wilfully attempted to evade and defeat such tax. [12]

The gist of the offense charged in the indictment is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax

law. The word "attempt," as used in this law, involves two things:

1. An intent to evade or defeat the tax, and,

Second, some act done in furtherance of such intent.

The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar year 1950 he had an income in such year which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such year.

There are various schemes, subterfuges and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt; that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the government. The attempt must be wilful, that is, intentionally [13] done with the intent that the government should be defrauded of the income tax due from the defendant at bar.

If you find, ladies and gentlemen, that a fraudulent return was filed with intent to defeat a part or all of the tax, and that this was done wilfully, the crime is complete as soon as the filing takes place.

Before the defendant in this case can be found guilty of the alleged charge set forth in the indictment, it must be established by the evidence beyond a reasonable doubt that the defendant had the specific intent to commit the acts therein alleged.

If, in your judgment as jurors, the prosecution fails to prove such specific intent beyond a reasonable doubt, or if after considering all of the evidence, you or any of you entertain a reasonable doubt as to whether the defendant had such specific intent, then you must return a verdict finding the defendant not guilty.

The gist of the offense is an act done with a fraudulent purpose. An honest error, whether due to incompetence of bookkeepers or to carelessness or ignorance on the part of the defendant or to some other cause would not support a finding of wilfulness. Good faith is a complete defense to the charge alleged in the indictment.

The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not [14] possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and

circumstances what the intent of the defendant was at the time in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

Further, in determining what the defendant's intent was, ladies and gentlemen, you may take into consideration any evidence you find of the concealment, if there be concealment, of fact by the defendant.

Further, on the question of intent to evade income taxes, there are certain matters which you may consider as pointing to such intent, if you find that they exist in this case.

These are general illustrations: Making false entries in the books, altering invoices, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal.

I give you these instances simply to illustrate the type [15] of conduct from which you may infer intent to evade taxes. And if the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose or purposes.

You are instructed that it is not necessary for the government to offer direct proof of wilfulness.

It is a rare case in which a defendant has said

to a witness that he did certain acts with the purpose of evading his tax liabilities.

In making your decision, therefore, as to whether or not the acts tending to conceal defendant's true tax liability were wilful, you may consider, as indicated earlier in my instructions, all of the circumstances of the case. You may infer wilfulness from the kind of evasion, if any, which you find the defendant committed; from his opportunity to know the true amount of his net income; and from such other facts which point to the existence or non-existence of the criminal state of mind of the defendant.

Evidence may be classified as direct or circumstantial. With respect to direct evidence, witnesses testify directly of their own knowledge as to the main facts to be proved. With respect to circumstantial evidence, proof is given of facts and circumstances from which the jury may infer other connecting facts which reasonably follow according to the common experience of mankind. Circumstantial evidence shall [16] be accorded treatment similar to that of direct evidence in ascertaining the facts of the case.

I further charge you, ladies and gentlemen, that the possession of money alone is not sufficient to establish net taxable income, but evidence of the possession of money and the expenditure of money may be considered as part of the chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

If you find that the defendant had substantial taxable income for the year 1950, which he did not report on his income tax return, then you will find that there was a substantial amount of tax due to the United States government for that year by the defendant.

As I have indicated to you, and now more precisely, the jury are the sole judges of the credibility of the witnesses and the weight to which their testimony is entitled. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by other evidence affecting his character for truth, honesty and integrity, or by contradictory evidence.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor while on the stand, [17] his intelligence, the relation which he bears to the government or to the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

You have heard expert testimony relating to the issues involved in this case. You are not bound by the computations or other testimony of any expert witness, but you should give such testimony the weight to which you determine it is entitled in the light of the other proof in the case, and also with reference to your conclusions as to whether or not

the facts, on which the particular expert's testimony was based, have been established by the necessary degree of proof.

The good character of a person accused of crime, when proven, is itself a fact in the case. It is a circumstance tending in a greater or lesser degree to establish his innocence. It must be considered in connection with all other facts and circumstances of the case, and may be sufficient when so considered in itself to raise a reasonable doubt of the defendant's guilt.

But if after a full consideration of all the evidence adduced, the jury believes the defendant to be guilty of the crime charged, they should so find, notwithstanding proof of good character.

I further charge you, ladies and gentlemen, that if you [18] should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of any witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies or such points affect the true issue in this case.

Examine such discrepancies or inconsistencies and disputed points and ask yourselves this question: How does the decision of this or that or the other discrepancy or matter in dispute affect the guilt or innocence of the defendant?

Regardless of what may be the truth concerning such discrepancies or inconsistencies, ask yourselves the main question: Did or did not the defend-

ant commit the charges as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant?

If they are not material, if the decision of the same is not necessary to enable you to arrive at the guilt or innocence of the defendant, then such discrepancies or disputed points are immaterial and minor matters, and you should waste no further time in discussing or considering them.

A witness may be impeached, ladies and gentlemen, by the party against whom he is called, by contradictory evidence; by evidence that he or she has made at other times statements [19] inconsistent with his testimony presently.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it is entitled to.

A defendant is not required, under the law, to take the witness stand; and if he fails to do so, no inference unfavorable to him should be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, that is, any fact which tends to prove or disprove the defendant's guilt or innocence, the jury has a right to distrust such witness' testimony in other

particulars, and in that case you are at liberty to reject the whole of the witness' testimony except insofar as he has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

The indictment in this case contains one count. The indictment was read to you during the early stages of the trial, and I take it there is no occasion to reread it to you at this juncture. Reference has been made to it in several particulars at several junctures of the trial.

Your verdict must be unanimous in arriving at a determination.

I ask you, ladies and gentlemen, not to concern yourselves [20] with the matter of punishment of the defendant in the event of a verdict of guilty. The matter of punishment is for the Court alone. Your province is to determine the guilt or innocence of the defendant.

You are expected to agree upon a verdict where you can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his or her own view when convinced that it is erroneous.

As I have indicated to you, your verdict must be unanimous; that is, all twelve jurors must agree.

When you retire to the jury room to deliberate, you will select one of your number as foreman or forelady, and he or she will sign your verdict for you when it is agreed upon, and he or she will represent you as your spokesman in the further conduct of the case in this court.

I caution you, ladies and gentlemen, that if it becomes necessary for the jury to communicate with the Court during its deliberations or upon its return to court, respecting any matter connected with the trial of the case, the jury should not indicate to the Court in any manner how the jury stands numerically or otherwise upon the issues submitted to the jury. This caution the jury should observe at all times after the case is submitted to you and until the jury has reached a verdict. [21]

Now, ladies and gentlemen, under the law we are obliged to note any exceptions or objections that counsel may have to the instructions which I have given to you, and if there are any, we will recess to chambers and record any such objections.

I take it counsel have some?

Ladies and gentlemen, the case has not been delivered to you thus far. This is a procedural detail that requires the attention of the Court, and I ask you to remain in the jury box. It will involve only a matter of several minutes.

(Thereupon Court, counsel and court attaches retired to court chambers where the following proceedings were had outside the presence of the jury:)

The Court: May the record show that we have returned to the Court's chambers and counsel and all parties are present?

Mr. Lockley: The government has no exceptions to the instructions, your Honor.

The Court: Very well. Mr. Johnston?

OBJECTIONS TO INSTRUCTIONS

Mr. Johnston: If the Court please, the defense will except at this time and object to the Court's failure to give the following instructions that were requested by the defense:

The first of the defendant's requested instructions is No. 18, which is on the subject of intent. The Court will recall that the requested instruction was based upon the case of *Block v. United States*, 221 Fed. 2d. 786. [22]

The Court: Very well.

Mr. Johnston: The ground of our objection is that the type of conduct mentioned in that instruction should be excluded from the area of wilfulness or intent as it applies to this alleged offense.

We are taking objection also to the Court's failure to give defendant's requested instruction No. 27, which has reference to lesser included offenses. Our objection there is based upon Section 145(a) of the Internal Revenue Code of 1939, and Rule 31(c) of the Federal Rules of Criminal Procedure.

I think, your Honor, also that the Court, although it commented on circumstantial evidence, did not undertake to define for the jury the difference or distinction between direct and circumstantial evidence, and we would note an objection at this time to the Court's failure to define circumstantial evidence for the jury as set forth in our proposed instructions Nos. 19 and 20.

The defense will also object to the instruction which the Court gave based upon the government's requested instruction No. 9.

The ground of our objection there is that some of the kinds of acts which are stated in that instruction by way of illustration find no support in the evidence in this case. I refer specifically to the reference to making false entries [23] in the books, the altering of invoices, the destruction of books.

Those are the objections that we would make, your Honor.

FURTHER STATEMENT BY COURT

The Court: You noted your objection to the failure to give defendant's requested instruction No. 27, did you? I think you did.

Mr. Johnston: Yes, your Honor.

The Court: And you also noted No. 18, defendant's requested instruction?

Mr. Johnston: Yes. No. 18, No. 27, and the definition of circumstantial evidence which we have attempted to set forth in No. 19 and No. 20, and also to the giving of government's instruction No. 9.

The Court: Do you have any comment at this time?

Mr. Lockley: No, your Honor, I think it is unnecessary for the government to make any comments.

The Court: All right. Very well. The record now is complete, and we now will excuse the alternate juror.

(Thereupon the Court, counsel and court attaches returned to the courtroom, and the following proceedings were had in the presence of the jury:)

The Court: Ladies and gentlemen, the arguments have been concluded and the Court has instructed you as to the law and the case rests now for your determination. [24]

The alternate juror may now be excused. Mr. Ellis, thank you very much for serving, and we appreciate your interest shown during the course of the trial.

(Thereupon the alternate juror was excused and retired.)

The Court: We now have twelve jurors ready for deliberation. You may now retire, ladies and gentlemen. The exhibits will be made available to you by the clerk, as well as the form of verdict that has been prepared for your convenience.

(Thereupon, at the hour of 10:50 a.m., the jury retired to deliberate upon its verdict.)

* * *

[Endorsed]: Filed February 8, 1956. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below are the originals filed in this Court in the above-

entitled case and that they constitute the record on appeal herein as designated by the attorneys for the Appellant:

Indictment.

Verdict of Jury.

Judgment & Commitment.

Defendant's Instructions Given & Given as Modified.

Defendant's Instructions Refused.

Notice of Appeal.

Designation of Matter to be Included in Record on Appeal.

Bill of Costs.

Objections to Plaintiff's Bill of Costs.

Order Sustaining Allowance of Cost of Transcript.

Notice of Appeal.

Plaintiff's Counter-Designation of Transcript to be Printed on Appeal.

Supplement to Designation of Matter to be Included in Record on Appeal.

Reporters Transcript, eight volumes, Oct. 14th, Dec. 5th, Dec. 6th, Dec. 7th, Dec. 8th, Dec. 9, Dec. 12th, & Dec. 14th.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of February, 1956.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15039. United States Court of Appeals for the Ninth Circuit. Carl C. Lee, Appellant vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: February 20, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit .

No. 15039

CARL C. LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant intends to rely on the following points on appeal:

1. The Court erred in overruling appellant's objections to the testimony of Government witness Augustus V. Brady and in denying appellant's motion to strike a portion of said Brady's testimony, all on the grounds of hearsay, opinion testimony, and that the questions asked of said Brady were not stated in hypothetical form.

2. The Court erred in refusing to give the following instructions requested by appellant:

(a) Requested Instruction No. 18, on the state of mind necessary to supply the intent necessary to warrant conviction.

(b) Requested Instruction No. 27, instructing the jury that it might find appellant guilty of the

lesser offense of wilfully failing to pay his correct income tax for the year 1950.

Dated this 24th day of January, 1956.

FRED PIERCE,

vs J. RICHARD JOHNSTON,

By /s/ J. RICHARD JOHNSTON,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 24, 1956.



No. 15,039

IN THE

United States Court of Appeals
For the Ninth Circuit

CARL C. LEE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

J. RICHARD JOHNSTON,

FRED PIERCE,

900 Financial Center Building, Oakland 12, California,

Attorneys for Appellant.

FILED

MAY 23 1956

PAUL P. O'BRIEN, CLERK



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No. 15,039

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CARL C. LEE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

By an indictment filed in the United States District Court for the Northern District of California on September 14, 1955 (R. 3-4), appellant was charged in one count with a violation of Section 145(b) of the Internal Revenue Code (26 U.S.C., Section 145(b)) by filing a false and fraudulent income tax return on behalf of himself and his wife with the Collector of Internal Revenue at San Francisco, California, within the jurisdiction of that Court. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure. Appellant was convicted and by final judgment filed on January 12, 1956, and entered on January 13, 1956,

was sentenced to imprisonment for five years and was fined \$10,000.00 (R. 5-6). Notice of appeal to this Court was filed on January 12, 1956 (R. 8-10). The appeal was timely (Rule 37(a), Federal Rules of Criminal Procedure). This Court has jurisdiction to review the final judgment of the District Court (28 U.S.C., Sections 1291, 1294).

The clerk of the trial court taxed costs against appellant in the amount of \$987.50 on January 17, 1956 (R. 10-11). On January 19, 1956, appellant filed an objection to an item of \$434.40 included in the bill of costs (R. 12), and the trial court overruled appellant's objection and allowed the item on January 26, 1956 (R. 13-14). Notice of appeal to this Court was filed on February 3, 1956 (R. 14-15). The appeal was timely (Rule 37(a), Federal Rules of Criminal Procedure). This Court has jurisdiction to review the order of the District Court (28 U.S.C., Sections 1291, 1294).

STATEMENT OF THE CASE.

Appellant Carl C. Lee was indicted on September 14, 1955, in one count under Section 145(b) of the Internal Revenue Code (26 U.S.C., Section 145(b)) for attempting to evade and defeat a large part of the income tax due and owing by him and his wife for the year 1950. The indictment alleged that the offense was committed by means of filing a false and fraudulent return for the year 1950 in which it was stated that the net income of appellant and his wife

was \$9,927.09 and that the tax owing thereon was \$1,282.00, whereas their joint net income for that year was actually \$69,162.69 upon which there was owing a tax of \$27,564.42 (R. 3-4).

The trial commenced on December 5, 1955, and continued until December 14, 1955, when it was submitted to the jury. On that date the jury returned its verdict of guilty (R. 4).

As its final witness at the trial, the Government called Augustus V. Brady, a technical advisor to the regional counsel of the United States Treasury Department. Brady was qualified as an expert accountant (R. 71). In the course of his training, he testified, he had taken all of the correspondence courses offered by the Bureau of Internal Revenue, and he had studied accounting approximately six years either at night school or by correspondence, through cost accounting. He held a public accountant's license and had testified as an expert in approximately fifteen income tax cases in the federal courts in San Francisco and Nevada. He testified that he had been present in the court throughout the trial, had reviewed all of the documents admitted in evidence, and had read the reporter's daily transcript of the testimony each day during the trial (R. 72). Upon the basis of the testimony of other witnesses and documentary exhibits admitted in evidence, Brady had made certain computations, and on the basis of those computations he testified as follows:

(a) Appellant had gross receipts of \$90,623.35 in 1950 (R. 75);

(b) Of that amount, appellant received \$80,333.00 in cash and \$10,293.35 by check (R. 75);

(c) The difference between appellant's gross receipts and the amount he reported on his return was \$74,735.60 (R. 76);

(d) Appellant's net income was \$84,662.69 (R. 78); and

(e) Appellant's tax liability, based upon that net income, was \$36,938.80, whereas he had reported a tax liability of only \$1,282.00 on his return (R. 78).

Although Brady admittedly had no personal knowledge of the matters as to which he was testifying, he was asked no hypothetical question stating the facts he was to assume as to any of the matters listed above until he was asked what amount of tax would be owing, assuming appellant had a net income of \$84,662.69 and had correctly reported the amount of his deductions, exemptions, and credits.

Counsel objected to the questions asked of Brady on the grounds that the assumptions on which the questions were based had not been stated (R. 73, 77), that they called for hearsay testimony (R. 74, 75, 76), and that they called for opinion testimony (R. 78). All of these objections were overruled.

Brady's testimony was concluded at the close of the day on Friday, December 9, 1955, and the Court thereupon took an adjournment until the following Monday morning at 10:00 a.m. (R. 79). Promptly upon the resumption of the trial on Monday, Decem-

ber 12, 1955, counsel for appellant informed the Court that he had several matters to take up with the Court outside the presence of the jury (R. 79-80). Counsel then renewed a motion to dismiss the indictment, which was denied (R. 80), and made a motion for judgment of acquittal, which was likewise denied (R. 80). Counsel then moved to strike substantially all of Brady's testimony on the ground that it was hearsay and on the further ground that it was opinion testimony which was not prefaced by the proper type of hypothetical question. The motion was denied (R. 80-81).

Appellant requested the Court to instruct the jury that the intent necessary to warrant a conviction was the intent to defeat or evade the tax due, and that filing a false return with any other bad purpose, without a justifiable excuse, without ground for believing it to be lawful, or with a careless disregard for whether or not one had the right to do so would not constitute, in themselves, the intent required by law (Defendant's Requested Instruction No. 18, R. 7).

Appellant also requested the Court to instruct the jury that if it was not convinced that he was guilty of the felony with which he was charged, but was convinced that he had wilfully failed to pay his correct income tax for the year 1950, a misdemeanor, it might find him guilty of the lesser offense (Defendant's Requested Instruction No. 27, R. 8).

Both of these requested instructions were refused by the trial court, and proper exception was taken to such refusal pursuant to Rule 30 of the Federal Rules of Criminal Procedure.

On January 13, 1956, the Government filed its Bill of Costs, requesting the clerk of the trial court to tax costs against appellant in the total amount of \$987.50 (R. 10-11). On January 17, 1956, the clerk taxed costs in that amount against appellant (R. 11). On January 19, 1956, appellant filed an objection to an item included in the Bill of Costs for payment of \$434.40 to the Court reporter for a copy of the daily transcript ordered by the Government for its use during the trial (R. 12). On January 26, 1956, the trial court issued its order (R. 13-14) overruling appellant's objection and allowing the item in question (R. 13-14).

SPECIFICATION OF ERRORS.

1. The Court committed error in overruling appellant's objections to testimony of the witness Brady as to appellant's gross receipts and his net income, and in thereafter denying appellant's motion to strike such testimony (R. 73, 74, 75, 76, 77-78, 80-81). Such testimony was inadmissible as hearsay and as opinion testimony, not given in response to proper hypothetical questions.

2. The Court committed error in refusing to give the following instruction requested by appellant (R. 7):

“No. 18

There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or

evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due.”

Appellant duly excepted to the failure to give this instruction, stating as his ground that the type of conduct mentioned in that instruction should be excluded from the area of wilfulness or intent as it applied to the alleged offense (R. 101).

3. The Court committed error in refusing to give the following instruction requested by appellant (R. 8):

“No. 27

The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor.”

Appellant duly excepted to the failure to give this instruction, relying for his grounds upon Section 145(a) of the Internal Revenue Code of 1939, and

Rule 31(c) of the Federal Rules of Criminal Procedure (R. 101).

4. The Court committed error in overruling appellant's objection to an item of \$434.40 paid to the Court reporter for a daily copy of the transcript ordered by the Government for its use during the trial (R. 12), which was taxed against appellant as an item of cost (R. 11).

SUMMARY OF ARGUMENT.

A. Augustus V. Brady, the Government's final witness, was qualified as an expert accountant and he proceeded to testify as to the amount and nature of appellant's gross receipts and net income in 1950. Although his testimony was based entirely upon the testimony of other witnesses and exhibits received in evidence, and he had no personal knowledge of the matters as to which he testified, the questions asked of him by the Assistant United States Attorney were not presented hypothetically and the assumptions which he was to make were not stated to him.

Brady testified that in 1950 appellant had received \$80,333.00 in cash and \$10,293.35 by checks; that his total receipts were \$90,623.35; that his business income was \$85,662.69; and that his net income was \$84,662.69;—all without having been asked a single hypothetical question.

Appellant's objections to this testimony on the grounds that it was hearsay and opinion testimony

were overruled. At the conclusion of Brady's testimony, appellant moved to strike on the same grounds, and the motion was denied.

As a result of the Government's failure to put its questions to Brady in hypothetical form, it is likely that his testimony carried more weight than it was entitled to and acquired far greater authenticity than if he had testified in response to proper hypothetical questions.

The rule is well settled that when an expert witness testifies upon the basis of the testimony of other witnesses and other evidence presented at the trial, his testimony should be given in response to hypothetical questions.

B. The Court should have given an instruction requested by appellant, based upon *Bloch v. United States* (CA 9, 1955) 221 F.2d 786, rehearing denied June 14, 1955, 223 F.2d 297, to the effect that the intent necessary to warrant conviction was the intent to defeat or evade the tax due, and could not be supplied by any other bad purpose.

C. Rule 31(c), Federal Rules of Criminal Procedure, provides that a defendant may be found guilty of an offense necessarily included in the offense charged. To be necessarily included in a greater offense, a lesser offense must be such that it is impossible to commit the greater without first having committed the lesser.

When this test is applied, it is apparent that the misdemeanor of wilfully failing to pay tax, which

is prohibited by Section 145(a) of the Internal Revenue Code of 1939, is necessarily included in the felony of wilfully attempting to evade or defeat tax, which is proscribed by Section 145(b). The misdemeanor consists of two elements: (1) a failure to pay the full amount of tax owing, and (2) wilfulness. The felony includes both of these elements plus an additional element not necessary to the misdemeanor, viz., some affirmative act of wilful commission. Since it is thus impossible to commit the felony without committing the misdemeanor, the lesser offense is included in the greater.

This was clearly recognized by the Supreme Court in *Spies v. United States* (1943) 317 U.S. 492, 63 S.Ct. 364, and it was recognized by the trial court in this case in its charge to the jury on the elements of the offense charged.

It follows that the Court should have instructed the jury, as requested by appellant, that if it was not convinced that the defendant was guilty of the felony, but was convinced that he had wilfully failed to pay his correct income tax, it might find him guilty of the lesser offense, a misdemeanor.

The case of *Berra v. United States* (CA 8, 1955) 221 F.2d 590, cert. granted December 5, 1955, U.S., 76 S.Ct. 190, involves a similar, although not identical, question as to whether a defendant charged with the felony under Section 145(b) was entitled to an instruction that the jury might find him guilty of a misdemeanor under Section 3616(a) of the Internal Revenue Code of 1939.

Appellant's rights were substantially prejudiced by the Court's refusal to give the instruction requested, since the term of imprisonment to which he was sentenced was greater than that which could have been imposed upon conviction of the misdemeanor under Section 145(a).

D. The rule is well established that the cost of a copy of the reporter's transcript purchased for the exclusive use and convenience of the plaintiff is not taxable, although the cost of a copy used by the Court is allowable. Since the daily transcript ordered by the Government in this case was for the exclusive use and convenience of Government counsel during the trial, and there is no indication that it was even seen by the judge, the cost of this transcript is not taxable to appellant under 28 U.S.C.A., Section 1920(2).

ARGUMENT.

A. THE TESTIMONY OF THE WITNESS BRADY AS TO APPELLANT'S GROSS RECEIPTS AND NET INCOME WAS INADMISSIBLE, AND THE COURT'S ACTION IN OVERRULING APPELLANT'S OBJECTIONS AND IN DENYING APPELLANT'S MOTION TO STRIKE SUCH TESTIMONY SUBSTANTIALLY PREJUDICED APPELLANT'S RIGHTS.

Augustus V. Brady was the final witness called by the Government. He was a technical advisor to the regional counsel's office of the United States Treasury Department. He testified that his education included all of the correspondence course offered by the Bureau of Internal Revenue in the subject of

accounting, including cost accounting. He had studied accounting for approximately six years, either at night school or by correspondence; he was licensed as a public accountant; and he had testified as an expert witness for the Government in more than fifteen cases over a period of seven years in the Federal Courts in San Francisco and Nevada (R. 71-72).

He had been present throughout the trial and had examined all of the exhibits admitted in evidence. On the basis of the testimony and exhibits, he had computed the net income of appellant for the year 1950 (R. 72).

Brady was then asked a series of questions as to appellant's gross receipts and net income in 1950 which he was permitted to answer over appellant's objection. Although Brady admittedly had no personal knowledge of the matters as to which he was testifying and his testimony was based entirely upon the testimony of other witnesses and other evidence in the case, the questions asked of him by the Assistant United States Attorney were not presented hypothetically and the assumptions which Brady was to make were not stated to him.

Brady was never asked a question in proper hypothetical form throughout his entire examination, until, at the conclusion of his examination, he was asked the amount of tax owing by appellant for 1950, assuming a specified net income and assuming deductions, exemptions, and credits as shown on his tax return.

Brady testified that appellant had received cash receipts of \$80,333.00, that he had received \$10,293.35 by checks, and that his total receipts were \$90,623.35 (R. 75). He testified that appellant's business income was \$85,662.69, and that his net income was \$84,662.69 (R. 78). And then, in response to the only hypothetical question asked of him, he testified that appellant's total tax liability would be \$36,938.80.

Appellant made frequent objections throughout the course of this testimony, as follows:

"Q. (By Mr. Lockley). Have you made a computation then of the receipts, total receipts from the business or profession received by Dr. Lee during the year 1950?

Mr. Johnston. I will object to it if the Court please as that calls for hearsay testimony. The man has no knowledge of the receipts that Dr. Lee had in 1950.

Mr. Lockley. I am merely asking him a preliminary question which may be answered yes or no.

The Witness. Yes I have."

(R. 74).

* * * * *

"Q. And can you give me a breakdown of the manner in which you arrived at the total figure of gross receipts from business or profession for the year 1950?

A. Yes, I can.

Q. Will you give them to me briefly?

A. I have a total cash receipts of \$80,000.

Mr. Johnston. I am going to object, your Honor that this again is hearsay testimony. I

have no question about Mr. Brady's qualifications and I assume that all he has done is total up a list of figures here and it is purely a mathematical computation, why, I have no objection to stating the total.

The Court. I assume it purports to be a summary or summation?

The Witness. Yes, Sir.

The Court. Very well, I will allow it.

Q. (By Mr. Lockley). What is the total figure of cash receipts?

A. I have \$80,333 and no cents.

The Court. Three hundred thirty-three? Three hundred thirty, three hundred thirty?

A. Yes. Amounts received by checks \$10,-293.35, making a total receipts from 11 patients of \$90,623.35."

(R. 74-75).

* * * * *

"Q. Now what did you allow in the nature of deduction, credits, and exemptions against that figure?

A. Well, the cost of goods sold as shown on the income tax return is \$2,003.31. That I did not disturb.

Q. There was also other business deductions of \$2,957.35?

Mr. Johnston. If the Court please, may it be understood that our objection based on hearsay goes to this entire line of testimony. The objection that we make is based on the theory that these figures, once that they are stated authoritatively as if they were stated as a fact are stated as an independent exhibit in existence, which I think is unfair.

The Court. All of this testimony as I gather it and view it is predicated upon either testimony offered in this court or written records including the return of the credit, is that correct?

The Witness. Yes, your Honor.

Mr. Lockley. I have no objection if your Honor cares to do so to give the jury the instruction at this time concerning the weight to be given to the testimony of an expert.

Mr. Johnston. If the Court please, this testimony is purely hypothetical and there has not been a single hypothetical question asked or a single assumption stated as such.

The Court. Thus far the testimony has been predicated upon the record, hasn't it?

Mr. Lockley. That is correct.

The Court. From the Government's theory?

Mr. Lockley. That is correct.

The Court. The objection is overruled."

(R. 76-77).

* * * * *

"Q. And what is the net income figure that you arrived at from this fact?

Mr. Johnston. If the Court please, I will try not to interrupt again but may the record also show that our objection is based upon the ground that this is opinion testimony?

The Court. Overruled."

(R. 77-78).

Brady's testimony was concluded at the close of the day on Friday, December 9, 1955. On the following Monday morning, appellant moved to strike substantially all of Brady's testimony on the ground that it was hearsay and on the further ground that it was

opinion testimony which was not prefaced by proper hypothetical questions (R. 80). The motion was denied (R. 81).

Brady was qualified as an expert, and his qualifications were impressive. His testimony could reasonably have been expected to carry great weight with the jury. While it is true that he explained that his computations were based upon the testimony of other witnesses, still the precise questions asked of him were, in many instances, stated without reference to that fact and without the statement of facts which Brady was intended to assume, and Brady's answers to such questions were in the form of flat statements of fact. It is likely, because of this, that Brady's testimony carried more weight with the jury than it was entitled to and that the figures, which he stated so positively, acquired, in the minds of the jurors, an authenticity far greater than they would have had if they had been given in response to proper hypothetical questions.

The rule is well settled that when an expert witness testifies not upon matters which are within his own knowledge but upon the basis of the testimony of other witnesses and other evidence which has been presented at the trial, his testimony should be based upon hypothetical questions stating all of the facts which he is asked to assume before expressing his opinion. Wigmore states the rule thus:

“Thirdly, though hypothetical presentation is thus not universally necessary, it is certainly necessary (for the reason just noted) where the

premises are not supplied by the witness himself. The premises must be brought out in some way. If the witness cannot himself supply them by details of his own observation, they must be presented hypothetically.”

2 Wigmore on Evidence (3rd ed., 1940), Section 676, p. 797.

This rule is adhered to in the Federal Courts.

“It is well settled that, in the examination of experts as to matters which they have not themselves observed, testimony as to their opinions should be predicated upon hypothetical statements propounded in proper questions, not upon the testimony of other witnesses whom they have heard testify.”

Dunnagan v. Appalachian Power Co., 33 F.2d 876, 878, cert. den. 50 S.Ct. 152, 280 U.S. 606.

“The rule is, as laid down in Greenleaf’s Evidence, ‘If the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated.’ ”

Dexter v. Hall (1872) 15 Wall. 9, 26.

**B. THE COURT FAILED TO INSTRUCT THE JURY PROPERLY
ON THE QUESTION OF INTENT.**

The Court refused to give the following instruction requested by appellant (R. 7):

“No. 18

There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due.”

This requested instruction was based squarely on this Court’s decision in *Bloch v. United States* (CA 9, 1955) 221 F.2d 786, rehearing denied June 14, 1955, 223 F.2d 297. In that case, this Court reversed a conviction under Section 145(b), in part because the trial court had given an instruction to the effect that wilfulness includes doing an act without justifiable excuse, without ground for believing that the act is lawful, or with a careless disregard for whether or not one has the right so to act. This Court said:

“In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would

filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section.”

The trial court should have given the instruction requested, and its failure to do so substantially prejudiced appellant’s rights.

C. THE COURT SHOULD HAVE GIVEN THE INSTRUCTION REQUESTED BY APPELLANT ON LESSER INCLUDED OFFENSE.

1. The felony with which appellant was charged necessarily includes the misdemeanor of wilful failure to pay tax.

Appellant requested an instruction, which the Court refused to give, that the jury might find appellant guilty of the misdemeanor of wilfully failing to pay his correct income tax, if the jury was not convinced that he was guilty of the felony with which he was charged.

Appellant was indicted under Section 145(b) of the Internal Revenue Code of 1939, the pertinent provisions of which are:

“ . . . any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter . . . shall . . . be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.”

Section 145(a) of the Code provides, in part:

“Any person required under this chapter to pay any . . . tax . . . who wilfully fails to pay such . . . tax . . . shall . . . be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.”

The instruction requested was as follows (R. 8):

“The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor.”

Appellant was entitled to this instruction under Rule 31(c), Federal Rules of Criminal Procedure, which provides:

“*Conviction of Lesser Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.”¹

¹Rule 31(c) is a restatement of Title 18 U.S.C., former Sec. 565, which provided:

“In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.”

This Court has approved the following definition of a necessarily included offense:

“To be necessarily included in the greater offense the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser.”

Giles v. United States (CCA 9, 1944) 144 F.2d 860, 861 (holding the offense of intentionally pointing and discharging a firearm is not necessarily included in negligent homicide);
Barbeau v. United States (CA 9, 1952) 193 F.2d 945, cert. den. 343 U.S. 968, 72 S.Ct. 1064 (holding the offense of negligent homicide is included in murder).

The rule approved in the *Giles* case was recently quoted with approval by the United States Court of Appeals for the Eighth Circuit in *Bianchi v. United States* (CA 8, 1955) 219 F.2d 182.

The question presented, then, is whether it is possible to commit the felony of wilfully attempting to evade or defeat income tax, under Section 145(b), without first having committed the misdemeanor of wilfully failing to pay income tax, under Section 145(a). It is clear that this is not possible.

If a taxpayer pays his correct tax in full when it is due, he cannot possibly be guilty of the felony of attempted tax evasion, since one of the elements of the felony offense is a failure to pay the full amount of tax owing.

“... it is settled judicially that in the absence of proof that the defendant owed more tax than

he paid, he could not be convicted under Sec. 145(b); . . .”

Balter, *Fraud Under Federal Tax Law* (2nd ed., 1953), p. 349.

“To establish its case the government must prove not only an attempt wilfully to defraud it but also that a tax in addition to what the taxpayer had already paid remains due and owing.”

United States v. Schenck (CCA 2, 1942) 126 F.2d 702, 704.

“Undoubtedly the burden was upon the government to prove that an income tax was due from Mr. Gleckman for the years in question over and above the amount returned—he could not be guilty of attempting to evade or defeat a tax unless some tax was due. *O’Brien v. United States*, 51 Fed. (2d) 1939.”

Gleckman v. United States (CCA 8, 1935) 80 F.2d 394, 399.

If a taxpayer fails to pay his correct tax, but his failure is unintentional or due to honest mistake, he cannot be guilty of either the misdemeanor or the felony, since wilfulness is an element of both offenses. However, if the failure to pay is wilful, the misdemeanor is made out; and when there is added to this wilful omission some affirmative act of wilful commission, the felony has been committed.

In other words, the felony includes the two elements constituting the misdemeanor, plus an additional element not necessary to the misdemeanor. It

is thus impossible to commit the felony without first having committed the misdemeanor.

This has been recognized by the Supreme Court in a leading case:

Spies v. United States (1943) 317 U.S. 492,
63 S.Ct. 364.

In *Spies* the defendant had been charged with a felony under Section 145(b) in an indictment which recited wilful failure to file a return and wilful failure to pay the tax as the means by which the felony was committed. The trial court refused to give an instruction requested by the defendant to the effect that to be guilty of the felony required some affirmative act in addition to the misdemeanors of wilful failure to file and wilful failure to pay. The Supreme Court reversed the conviction, holding that the defendant was entitled to such an instruction.

In the course of its opinion the Supreme Court discussed at length the relationship between Section 145(a) and 145(b), and particularly between a wilful failure to pay tax and a wilful attempt to evade or defeat tax. The Court said:

“A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. *We think it clear that this felony may include one or several of the other offenses against the revenue laws.* But it would be unusual and we would not readily assume that Congress by the felony defined in Section 145(b) meant no more than the same derelictions it had just defined in Section 145(a)

as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

“The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U.S. 389 [3 USTC Par. 1194]. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

“Had Section 145(a) not included willful failure to pay a tax, it would have defined as misde-

meanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of Section 145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such non-payment as a misdemeanor we think argues strongly against such an interpretation.

“The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term ‘attempt,’ as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common law ‘attempt.’ The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. *We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the*

lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.” (Italics added).

317 U.S. at pp. 497-499, 63 S.Ct. at pp. 367-368.

Here is clear recognition that the felony includes the misdemeanor of wilful failure to pay.

The trial court in this case likewise recognized this principle when it correctly instructed the jury (R. 91):

“To establish its case, the government must prove beyond a reasonable doubt both of the following two elements:

“1. That substantial income tax was due and owing from the defendant in addition to that declared in his income tax return; and,

“Second, that the defendant wilfully attempted to evade and defeat such tax.”

The Supreme Court has very recently held that a defendant charged with a felony under Section 145(b) was not entitled to an instruction that the jury might find him guilty of a misdemeanor under Section 3616(a)² of the Internal Revenue Code of 1939.

Berra v. United States (April 30, 1956)

U.S., S.Ct., 56-1 U.S.T.C.

Par. 9480.

²Section 3616(a) reads as follows:

“Whenever any person—

“(a) *False Returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or state-

Berra is clearly distinguishable from this case, since there the Court held that Section 3616(a) covered exactly the same ground as Section 145(b), the two sections presenting the same factual issues for the jury's determination. The Court held that it was not for the jury to decide whether to apply one section rather than the other, but only to decide the issues of fact. The Court stated, however:

"In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense."

..... U.S. at p., S.Ct. at p., 56-1
U.S.T.C. Par. 9480 at p. 55,267.

The precise question presented in this case was presented in *Dillon v. United States* (CA 8, 1955) 218 F.2d 97, cert. granted 349 U.S. 914, 75 S.Ct. 603, cert. dismissed December 5, 1955, U.S., 76 S.Ct. 191. There a defendant indicted under Section 145(b) had requested an instruction, which was refused, that the jury might find him guilty of a misdemeanor under either Section 145(a) or Section 3616(a). *Certiorari* was granted, then later dis-

ment, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; . . .

* * * * *

" . . . he shall be fined not exceeding \$1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

missed, due to the death of the appellant. On the same day *certiorari* was dismissed in *Dillon*, *certiorari* was granted in *Berra*.

It may be noted that of the several misdemeanors proscribed by Section 145(a), only one, a wilful failure to pay tax, is necessarily included in the felony under Section 145(b). The felony may be, and frequently is, committed without the defendant being guilty of wilful failure to make a return, keep records, or supply information. But the felony cannot be committed without a wilful failure to pay tax.

2. Appellant's rights were substantially prejudiced by the Court's refusal to give the instruction requested.

Under Rule 31(c), the jury could have found appellant guilty of a wilful failure to pay his tax, in violation of Section 145(a), since that offense is necessarily included in the felony with which he was charged. Evidence which would support a conviction of the felony would necessarily support a conviction of the misdemeanor. But the jury could not know this unless it was so instructed by the trial judge. It was not so instructed, but was told only that it might find appellant guilty or not guilty of the felony with which he was charged (R. 93, 97, 99).

Had the jury known that it had a third alternative, *viz.*, to find appellant guilty of a misdemeanor under Section 145(a), it might have returned such a verdict. In that case, the maximum term of imprisonment to which appellant could have been sentenced would have been one year, whereas the sentence im-

posed included imprisonment for a period of five years.

Appellant's rights were thus substantially prejudiced by the Court's refusal to give the instruction requested on lesser included offense.

D. THE GOVERNMENT IS NOT ENTITLED TO RECOVER FROM APPELLANT THE COST OF A DAILY COPY OF THE COURT REPORTER'S TRANSCRIPT.

Costs which were taxed against appellant included the sum of \$434.40 which was paid to the court reporter for a daily copy of his transcript ordered by the Government for its use during the trial (R. 10). Appellant's objection to this item (R. 12) was overruled by the trial court, which held that the transcript "was necessarily obtained by counsel for plaintiff for use in the trial of the case." (R. 14).

Title 28 U.S.C.A., Section 1920(2), provides:

"A judge or clerk of any court of the United States may tax as costs the following:

* * * * *

"(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."

The rule as to the imposition of costs is the same in criminal cases as in civil.

Bozel v. United States (CCA 6, 1943) 139 F.2d 153.

That rule is that the cost of a copy of the transcript purchased for the exclusive use and convenience of

plaintiff is not taxable, although the cost of a copy used by the court is allowable.

Cooke v. Universal Pictures (S.D.N.Y., 1955)
135 F.Supp. 480;

Vort v. McGrath (D.C., 1951) 108 F.Supp. 263.

See, also:

Kenyon v. Automatic Instrument Co. (W.D. Mich., 1950) 10 F.R.D. 248, 254.

In *Kenyon* the Court stated:

“The general practice in this and other Federal courts is that the losing party bear the expense of the original transcript which is furnished for the use of the court. . . . The expense of any additional copies of the transcript obtained by the parties for their own personal use must, of course, be borne by them.”

Ibid., at p. 254.

This was also the rule prior to the enactment of Title 28 U.S.C.A. Section 1920(2) in 1948.

Atwood v. Jaques (C.C.W.D.Mo., 1894) 63 Fed. 561 (disallowing the cost of copies of transcript ordered by respondent for his use and the use of his counsel);

Donata v. Parker Pen Co. (S.D.N.Y., 1945) 7 F.R.D. 148, 149 (allowing the cost of an original transcript ordered by the Court for its own use);

Stallo v. Wagner (CCA 2, 1917) 245 Fed. 636, 641 (disallowing, under Equity Rule 50, the cost of a copy of a transcript obtained by the opposing party for his own use).

In one case, where the cost of a transcript was allowed, it is not clear from the opinion whether the transcript was ordered by the Court or by counsel:

Sulzbacher v. Travelers Ins. Co. (M.D.Pa., 1942)
2 F.R.D. 490, 491.

In at least three other cases where the cost of a transcript was allowed, the trial judge had found it necessary to use the transcript:

Perlman v. Feldman (D.Conn., 1953) 116 F. Supp. 102, 109, reversed on other grounds (CA 2, 1955) 219 F.2d 173, cert. den. (1955) 349 U.S. 952, 75 S.Ct. 880;

Consolidated Fisheries Co. v. Fairbanks, Morse & Co. (E.D.Pa., 1952) 106 F.Supp. 714;

Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp. (W.D.Mo., 1951) 11 F.R.D. 259, 266.

These cases are therefore distinguishable from the present case, where the Court specifically found that "the stenographic transcript was necessarily obtained by counsel for plaintiff for use in the trial of the case," (R. 14), and there is no indication that it was ever seen by the judge.

In one case, the extra cost of a daily transcript was not allowed, although the cost of a nondaily transcript was allowed.

Stein v. Rosenthal (S.D.Calif., 1952) 103 F. Supp. 227, 232.

Appellant has found not one reported decision allowing the cost of a daily copy of a reporter's tran-

script where it is clear that it was ordered and used exclusively by a party and his counsel. On the contrary, it is clear that under those circumstances the well established practice is to require the party ordering the transcript to bear the expense thereof.

CONCLUSION.

The judgment of conviction entered below should be reversed. If that judgment is affirmed, the order allowing the cost of the daily transcript ordered by plaintiff should be reversed.

Dated, Oakland, California,

May 18, 1956.

Respectfully submitted,

J. RICHARD JOHNSTON,

FRED PIERCE,

Attorneys for Appellant.

No. 15,039

IN THE

United States Court of Appeals
For the Ninth Circuit

CARL C. LEE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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No. 15,039

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CARL C. LEE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

On September 14, 1955 an indictment in one count was filed against appellant in the United States District Court for the Northern District of California, Southern Division, charging wilful attempt to defeat and evade taxes of appellant and his wife for the year 1950 by the filing of a false and fraudulent joint income tax return in violation of Section 145(b) Internal Revenue Code (R. 3-4). Jurisdiction was conferred on the District Court by 18 United States Code, Section 3231. After a jury trial, appellant was found guilty as charged (R. 4). Sentence was imposed and judgment entered on January 11, 1956 (R. 5-6). Notice of appeal was filed on January 12, 1956 (R. 8-10).

The jurisdiction of this Court is invoked under 28 United States Code, Section 1291.

The judgment of the District Court allowed costs of prosecution to appellee (R. 6) and they were taxed at \$987.50 on January 17, 1956 (R. 10-11). Appellant, on January 19, 1956, filed his objection to an item of \$434.40 for the cost of a daily transcript (R. 12-13) which was overruled by the trial Court (R. 13-14). Notice of appeal was filed on February 3, 1956. Jurisdiction is invoked under 28 United States Code, Sections 1291 and 1294.

STATEMENT OF THE CASE.

The indictment charged appellant with wilfully attempting to defeat and evade a large part of the joint income taxes of himself and his wife for the year 1950 by filing a false return in which he stated that he and his wife had a net income of \$9,927.09 on which the taxes amounted to \$1,282.00, whereas he knew that their net income was \$69,162.69 and he owed taxes of \$27,564.42 (R. 3-4). After conviction appellant was sentenced to five years imprisonment and fined \$10,000 and costs of prosecution (R. 4-6).

Appellant in his statement of the case has failed to inform this Court of the facts which show overwhelming proof of his guilt. He has alluded to the testimony of only one witness (who prepared the Government's summary), and has ignored the unde-

niable and uncontradicted testimony of eleven "patients" who in 1950 paid \$90,623.35 (of which \$80,333.00 was in cash) for Chinese herb "tea". We will here briefly outline the highlights of the evidence which the jury might have believed.

Mr. DeCoe prepared two 1950 tax returns for appellant from financial statements or memoranda furnished to him (R. 18-19). The return actually filed by appellant with the Director of Internal Revenue was the second 1950 return prepared by DeCoe for appellant and showed a lesser amount of tax than the first return prepared (R. 18-21; Ex. 1). After noting the large amount of tax on the original return, appellant secured new figures for DeCoe to work from. DeCoe could not recall whether the second set of financial statements showed greater deductions on lesser income, but it resulted in a smaller tax (R. 18-20).

Appellant in 1950, and prior thereto, was engaged in dispensing unidentified Chinese herbs, herb medicine, and herb tea to wealthy "patients" from a store in Sacramento, California (R. 29, 37, 40, 52, 54, 61, 63, 66). The prices charged varied from customer to customer, and the patients were told it depended on the strength of the herb elixir supplied (R. 24, 28-29, 37, 43-49, 54, 61, 63). His practice was to charge a varying weekly rate for a daily cup of tea; for example, \$25.60 paid by Phelps (R. 63); \$35.00 or \$40.00 by Frazer (R. 26-29; Ex. 6); \$100.00 by Mrs. Cavell (R. 41, 48) and \$55.50 by Fernandez (Ex. 37). Most of these weekly payments were made by check

payable to appellant, and they total \$10,273.35 for 1950 from eleven known patients (R. 75; Exs. 2, 3, 5, 6, 13, 15, 25, 36, 37).

In addition to the daily cup of tea, appellant sold to various patients a "special" herb for which he required payment in cash. The witness Frazer testified that after taking the \$35 a week course of treatments for a month or six weeks, appellant started him on a different and expensive medicine which appellant told him was an herb from China that was smuggled into the country (R. 28-29). Appellant told Frazer he had clients who were paying him \$40,000 or \$50,000 for this treatment (R. 29, 37). Frazer paid appellant \$12,500 for such a 3-month course of treatment, the payment being in cash consisting of \$100 bills at the instruction of appellant (R. 30-31, 34, 37). During the Internal Revenue investigation, appellant, on two occasions, sought Frazer out and asked him to testify that the \$12,500 represented a loan rather than payment for medical treatment (R. 3-34).

Appellant's attempt to suborn perjury was almost successful, for at the trial Frazer revealed for the first time which testifying that he had actually paid an additional \$13,500 to appellant in cash making a total cash payment of \$26,000 in 1950 (R. 34-38; Exs. 7, 8, 9, 10).

Mrs. Ila High, secretary to Grace A. Cavell, accompanied her employer on trips to appellant's place of business and kept records of the amounts of check and currency paid to him (R. 38-44; Ex. 24). At his request, Mrs. Cavell paid appellant \$1,175 at \$100 a

week by check and made various payments of currency aggregating \$6,600 (Exs. 24, 25). Appellant requested that no record be made of these transactions (R. 41) and when he learned of the existence of the record during the Treasury investigation, he sought out Mrs. Cavell and asked her to testify falsely that she had seen him hand the money on to another person (R. 50-51).

The herbs were represented as being very expensive, taking a long time to grow in China, and would speed Mrs. Cavell's recovery and probably guarantee she would live twenty years (R. 44-46). During negotiations as to price, appellant suggested different strengths of the medication and quoted prices varying from \$75,000 for a "synthetic" herb fluid to \$327,500 for the "super" (R. 46-48, Ex. 32). Mr. Phelps, another patient, recommended appellant's herb tea to Mrs. Cavell as having saved his life and said that it was very expensive (R. 49).

Phelps testified that the amount paid by him to appellant prior to 1950 was "considerable"—twenty or thirty thousand dollars" (R. 66-67). He also recited the cup-of-tea-a-day ritual, for which he paid \$25.60 each week by check (Ex. 46), and said that he also made currency payments of \$1,900 in 1950 (R. 63-64; Exs. 47-51 incl.). The reason payment was by cash was that appellant asked for it (R. 66). During the investigation appellant had told Phelps of the examination of his returns and asked him to report to the agents that he had paid by check only and no cash (R. 67-68).

The witness Harmon also paid appellant in currency at his request although some payments were by check (R. 23-24). None of the witnesses was presented with a bill or given a receipt for the payments made (R. 23, 27, 42, 53-54, 62). Appellant asked his clients not to make records of the transactions with him (R. 41, 51).

John Fernandez testified that he had paid currency in advance to appellant, at his request, for some herbs from China which Fernandez described as tea (R. 54, 58). He produced checks to appellant for \$55.50 a week (Ex. 37) and cancelled checks to cash in the amount of \$1,000 (Ex. 38); \$15,000 (Ex. 39); \$22,750 (Ex. 40); \$2,750 (Ex. 41); \$2,000 (Ex. 42); and \$2,000 (Ex. 43) and testified that these amounts totalling \$45,500 had been paid in cash to appellant in 1950 (R. 52-62). The total sum appellant requested of Fernandez for his course of treatment aggregated \$120,000 and he represented the treatment would put Fernandez "80% normal" (R. 59-60).

Agent Kerdus testified he had never seen the books and records of appellant and that it was only by extensive investigation of records of banks that he was able to locate the eleven patients who testified (R. 69-70). The exhibits in evidence and testimony established \$10,293.35 paid by check to appellant and \$80,330.00 paid in currency in one year, thus aggregating total receipts of \$90,623.35. Appellant's income tax return reported gross receipts of \$15,887.75 (Ex. 1).

As its last witness, the Government called Augustus V. Brady, who was qualified as an expert witness in

tax calculations, and who had been present throughout the course of the trial and had examined all the exhibits. (R. 71-72). He testified that in his computations he had allowed the business deductions, personal deductions and exemptions as claimed on the return (R. 72-73; Ex. 1). He was asked if he had made a summary of appellant's business receipts in 1950. The question was objected to and when allowed to answer, the witness answered that he had done so from the testimony and exhibits in evidence. He was then asked for a breakdown of the manner in which he arrived at the total figure of gross receipts (R. 75). Appellant's counsel objected, but said "I have no objection to stating the total." (R. 75). The totals were then given as \$80,333.00 in cash receipts, and \$10,293.35 by check for a total of \$90,623.35 from eleven patients (R. 75). Brady then subtracted the amount of gross income reported (Ex. 1) of \$15,887.75 from the \$90,623.35 gross income to arrive at \$74,735.60 gross income unreported (R. 75-76). No objections were made to this testimony.

Brady then testified that he had subtracted the amounts of business expense as claimed on the return and the standard deduction for personal allowable deductions in arriving at net income (R. 76-78). This testimony was objected to (R. 76-78). Brady was then asked to compute the tax by a hypothetical question assuming the net income figure of \$84,662.69 testified to and assuming the accuracy of the deductions and credits on the return. He answered that the tax would be \$36,938.80 as compared with \$1,282.00 reported (R. 78). Exhibit 52, the written schedule of Brady's testi-

mony, was not offered in evidence (R.79). Appellant did not cross-examine (R. 78), and the Government rested (R. 79).

Appellant did not take the stand to testify in his own defense.

The statement relating to taxation of costs of the daily transcript is set forth in the Argument, Part V.

STATUTE INVOLVED.

Internal Revenue Code: Sec. 145. Penalties.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any person required under this chapter to collect, account for, pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

[26 U.S.C. 145]

QUESTIONS PRESENTED.

1. Whether the testimony of an expert witness, based on the testimony and exhibits in evidence was

inadmissible as hearsay because not given in response to hypothetical questions.

2. Whether the instructions on intent were correct.

3. Whether appellant was entitled to an instruction that failure to pay tax is a lesser offense included in the felony of wilfully attempting to defeat and evade tax.

4. Whether the cost of a daily transcript was properly allowed to appellee as necessarily obtained for use in the case.

SUMMARY OF ARGUMENT.

I and II. Appellant concedes the accuracy of the calculations of the witness Brady, who summarized the figures contained in numerous documents admitted into evidence. On six occasions it was made clear that his computations were based on the testimony and exhibits in evidence and not on his personal knowledge. This method of questioning based on the record has been approved in *United States v. Johnson*, 319 U.S. 503, and, in any event, it was harmless error if error at all.

III. The jury was fully and correctly instructed on intent in the general charge of the Court, and appellant was not entitled to an additional instruction enumerating acts or conduct which did not constitute intent; especially since there was no evidence of such acts or conduct to support the requested instruction.

IV. The requested instruction that wilful failure to pay tax is a lesser offense included in the charge of attempted evasion of tax was properly refused.

(a). The offenses are separate and distinct, and the one is not necessarily included in the other since they require different proof.

(b). There was no reasonable view of the evidence whereby the jury could have found appellant guilty of the failure to pay tax without being obliged to find him guilty of evasion of tax.

(c). The instruction was so hopelessly incomplete it could only have resulted in confusing the jury.

V. The costs were properly taxed. The daily transcript was necessarily obtained for use in the case, and it was properly allowed in the discretion of the trial judge.

ARGUMENT.

I. THE SUFFICIENCY OF THE EVIDENCE IS NOT QUESTIONED.

“Unlike many other trapped tax-evaders, the appellant does not maintain, like Abimeleck of Gerar, that in the integrity of my heart and innocence of my hands have I done this.” [Gen. 20:5]. *Campodonico v. United States*, 222 F. 2d 310 (C.A. 9, 1955) certiorari denied 350 U.S. 831. He does not challenge the overwhelming and uncontradicted proof that he received from eleven witnesses alone almost six times the amount of gross income and over eight times the

amount of net income he disclosed to the Government in his return. On the contrary, he at least impliedly concedes his guilt, but complains that questions to a witness were not couched in terms of technical nicety and that the instructions of the court were erroneous.

II. BRADY'S TESTIMONY WAS PROPERLY ADMITTED.

Appellant contends that the summary testimony of the witness Brady (R. 72-78) was inadmissible as hearsay and prejudicial because not elicited in response to artfully framed hypothetical questions (App. B. 11-17). At the trial he did not avail himself of the opportunity to cross-examine Brady (R-78), and he does not now question Brady's qualifications or the accuracy of his computations or the evidence on which they were based.

The propriety of summary accounting testimony in complicated tax cases is too well established to dispute.¹ Such testimony is to aid the jury in correlating and understanding the otherwise disconnected and involved mathematical problems presented by the numerous exhibits, and it does not invade the province of the jury. *United States v. Johnson*, 319 U.S. 503, rehearing denied 320 U.S. 808. Nor does appellant

¹*Bateman v. United States*, 212 F.2d 61 (C.A. 9, 1954);
Cooper v. United States, 9 F.2d 216 (C.A. 8, 1925);
Graves v. United States, 191 F.2d 579 (C.A. 10, 1951);
Paschen v. United States, 70 F.2d 491 (C.A. 7, 1934);
Remmer v. United States, 205 F.2d 277, 289 (C.A. 9, 1953);
United States v. Mortimer, 118 F.2d 266 (C.A. 2, 1941).

contend otherwise. He bases his claim of error solely on the ground that since Brady's testimony was not given in response to properly couched hypothetical questions, it was likely that it carried more weight with the jury than it was entitled to (App. Br. 16).

The jury could not possibly have been misled as to the source of Brady's figures, or have believed that he was testifying from personal knowledge. On six separate occasions it was clearly brought out that Brady's summary was based on the testimony and exhibits in evidence:

R. 72: A. Mr. Lockley, I made a computation which I considered a computation of net income based on a summary of receipts from the testimony and exhibits in evidence.

* * * * *

R. 73: A. No. I took the income as shown on the return, the deductions shown on the return, and just added to the business income the difference between the receipts testified to here from exhibits and testimony and receipts as shown on the income tax return.

* * * * *

R. 74: A. I made a summary of receipts from the testimony and exhibits here in evidence.

* * * * *

R. 75: Mr. Johnston. I am going to object your Honor that this again is hearsay testimony. I have no question about Mr. Brady's qualifications and I assume that all he has done is total up a list of figures here and it is purely a mathematical computation, why, I have no objection to stating the total.

The Court. I assume it purports to be a summary or summation?

The Witness. Yes, sir.

* * * * *

R. 76: The Court. All of this testimony as I gather it and view it is predicated upon either testimony offered in this court or written records including the return of the credit, is that correct?

The Witness. Yes, your Honor.

* * * * *

R. 77: The Court. Thus far the testimony has been predicated upon the record, hasn't it?

Mr. Lockley. That is correct.

* * * * *

The Supreme Court has placed its stamp of approval upon the identical type of questioning as employed here in the tax evasion case of *United States v. Johnson*, 319 U.S. 503, 519 (1943), rehearing denied 320 U.S. 808. The Court of Appeals for the Seventh Circuit had reversed Johnson's conviction, in part because in examining the Government's expert "Not a single question by which the objectionable answers were elicited contains any assumption or hypotheses." 123 F.2d 111, 127. (But see Judge Evans dissent at page 138). In reversing the Court of Appeals and affirming the conviction of Johnson, the Supreme Court said (p. 519):

"A ruling on evidence, much pressed upon us, must finally be noticed. The court below held that the admission of the testimony of an expert witness regarding Johnson's income and expenditures during the disputed period invaded the jury's

province. The witness gave computations based on substantially the entire evidence in the record as to Johnson's income. The Circuit Court of Appeals held that while undoubtedly 'a proper hypothetical question could have been framed and propounded,' in fact the witness was not giving answers on the basis of any assumption or hypothesis but as testimony on the 'controverted issue' in the case. 123 F.2d at 128. We do not so read the meaning of this testimony. No issue was withdrawn from the jury. The correctness or credibility of no materials underlying the expert's answers was even remotely foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury. The judge's charge was so clear and correct that no objection was made, though, of course, there were exceptions to the refusal to grant the usual requests for charges that were either redundant or unduly particularized items of testimony. The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumption of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammelled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and

in the appropriate submission of evidence within the general framework of familiar exclusionary rules.’’

See also *Remmer v. United States*, 205 F.2d 277, 289 (C.A. 9, 1953), reversed on other grounds 347 U.S. 227 and 350 U. S. 377; *Legatos v. United States*, 222 F.2d 678, 684 (C.A. 9, 1955); *Hanson v. United States*, 186 F.2d 61 (C.A. 8, 1950); *Beaty v. United States*, 213 F.2d 712 (C.A. 4, 1954) judgment vacated 348 U.S. 905, reaffirmed 220 F.2d 681, cert. denied.

Appellant fails to suggest that the testimony was in any degree inaccurate; or that complex hypothetical questions would have resulted in any different answers. He failed to ask even one question on cross-examination. In fact, he acquiesced in the testimony stating only the total figures, and no effort was thereafter made to have Brady testify as to the various items contained in his totals (R. 75). Nor did he object to the instructionse given on the evaluation of the testimony of expert witnesses (R. 96).

Clearly, if there was error at all, which we vigorously deny, it was harmless error and did not affect substantial rights. Rule 52, Federal Rules of Criminal Procedure.

III. THE COURT'S INSTRUCTIONS ON INTENT WERE CORRECT AND COMPLETE.

Appellant next contends that it was error to refuse a requested instruction based on the decision of this

Court in *Bloch v. United States*, 221 F.2d 786 (C.A. 9, 1955), rehearing denied 223 F.2d 297.² What he fails to observe is that the jury was properly instructed on the element of intent. They were told repeatedly that the attempt to evade tax must be a specific wilful attempt (R. 86, 91, 92, 93, 94, 95). He now appears to contend that in addition to being told affirmatively what constitutes wilful intent the jury should be instructed negatively as to what is not wilful intent.

The length to which the court went in making it clear that specific intent to evade tax is a necessary element of the offense can only be measured by a complete reading of the instructions (R. 91-95). Some appreciation of the thoroughness of the charge may, however, be gained from the following excerpts (R. 91-93):

“ . . . The gist of the offense charged in the indictment is a wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word ‘attempt’, as used in this law, involves two things:

“1. An intent to evade or defeat the tax, and,

“Second, some act done in furtherance of such intent.

²The instruction requested was as follows:

“There is only one state of mind that will supply the intent necessary to warrant a conviction in this case, and that is the intent to defeat or evade the tax due. Filing a false return with any other bad purpose would not supply the necessary intent. Nor would filing a false return without a justifiable excuse, or without ground for believing it to be lawful, or with a careless disregard for whether or not one has the right so to do, constitute, in themselves, the intent which is required by the law. You may find the defendant guilty in this case only if you find that he knowingly filed a false return with the intention of evading or defeating the tax due.”

“The word ‘attempt’ contemplates that the defendant had knowledge and understanding that during the calendar year 1950 he had an income in such year which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar year and which he knew it was his duty to state in his return for such year.

“There are various schemes, subterfuges and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing a false and fraudulent return with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

“The attempt to evade and defeat the tax must be a wilful attempt; that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws which it was the duty of the defendant to pay the government. The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant at bar.

“If you find, ladies and gentlemen, that a fraudulent return was filed with intent to defeat a part or all of the tax, and that this was done wilfully, the crime is complete as soon as the filing takes place.

“Before the defendant in this case can be found guilty of the alleged charge set forth in the indictment, it must be established by the evidence beyond a reasonable doubt that the defend-

ant had the specific intent to commit the acts therein alleged.

“If, in your judgment as jurors, the prosecution fails to prove such specific intent beyond a reasonable doubt, or if after considering all of the evidence, you or any of you entertain a reasonable doubt as to whether the defendant had such specific intent, then you must return a verdict finding the defendant not guilty.

“The gist of the offense is an act done with a fraudulent purpose. An honest error, whether due to incompetence of bookkeepers or to carelessness or ignorance on the part of the defendant or to some other cause would not support a finding of wilfulness. Good faith is a complete defense to the charge alleged in the indictment . . .”

The Court not only specifically charged that intent was an essential element of the offense, that is, bad faith, but that good faith was a complete defense (R. 93). *Bateman v. United States*, 212 F.2d 61 (C.A. 9, 1954).

Having been fully covered by the general charge of the Court, the instruction here requested was properly refused. *Coffin v. United States*, 162 U.S. 664, 672; *Agnew v. United States*, 165 U.S. 36, 51.

In *Friedberg v. United States*, 207 F.2d 777 (C.A. 6th), affirmed 348 U.S. 142, an income tax evasion case under Section 145(b), the trial Court charged:

“As to all counts, if any, you find the Government has proved beyond a reasonable doubt, the defendant attempted to defeat or evade the tax,

you must next consider whether or not such attempted evasion, if any, was willful. In this connection the Court instructs you that the word 'willful' means not only intentional or knowing, but 'done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, and perversely.'"

Of the trial Court's instructions in *Friedberg*, the Court of Appeals said:

"* * * the court delivered to the jury a clear and correct charge, in which the rights of appellant were fully protected with extreme care, * * *"

In reviewing the conviction, the Supreme Court found no error at all in the trial Court's instructions.

Certainly, one of the prerogatives of a federal trial judge is to phrase his own charge. If it states the applicable law correctly, as this charge did, defendant may not be heard to complain that it offends his literary taste. *Barshop v. United States*, 191 F.2d 286 (C.A. 5, 1951), cert. denied 342 U.S. 920 (1952); *Wright v. United States*, 175 F.2d 384 (C.A. 8, 1949), cert. denied 338 U.S. 873 (1949); *United States v. Smith*, 206 F.2d 905 (C.A. 3, 1953).

Moreover, the Court properly refused the instruction since it would only have confused the jury. There is nothing in the record to support the theory that the return was filed with any other bad purpose, or without justifiable excuse, or without ground for believing it lawful, or with a careless disregard. The evidence of the prosecution established receipt of cur-

rency and a wilful intent to evade tax by filing the false returns. The defense was simply that appellant never received the sums of money in question (R. 36, 62), and it follows that the defense theory was that the return was correct. The refusal to give an instruction embodying even a correct legal proposition is not error unless there be evidence rendering the legal theory applicable to the case. *Coffin v. United States*, 162 U.S. 664, 667.

The requested instruction is a negative expression of an instruction this Court found fatal in *Bloch v. United States*, 221 F.2d 786 (C.A. 9, 1955), rehearing denied 223 F.2d 297. Whatever vitality the opinion of this Court in *Bloch* retains in view of the later decisions in *Brown v. United States*, 222 F.2d 293 (C.A. 9, 1955), and *Herzog v. United States*, 226 F.2d 561 (C.A. 9, 1955), reaffirmed May 29, 1956 after hearing *en banc*, it has no bearing on this case. The instructions found erroneous in *Bloch* were not given herein. The jury was properly informed of the requirement of specific intent and appellant was entitled to no more.

IV. THE INSTRUCTION ON LESSER INCLUDED OFFENSE WAS PROPERLY REFUSED.

Appellant was charged with a felony under Section 145(b), Internal Revenue Code of 1939. He requested an instruction that the jury might find him guilty of the misdemeanor of wilful failure to pay his correct income tax under Section 145(a) (R. 8, 101-102). The

request was denied. He contends that the misdemeanor offense of failure to pay tax is contained in the felony offense of evasion of tax and that under Rule 31(c) of the Federal Rules of Criminal Procedure he was entitled to the instruction. Pertinent portions of Sections 145(a) and (b) are quoted in footnote³ below. The requested instruction was as follows (R. 8):

“The defendant is charged with wilfully attempting to evade and defeat his income taxes and those of his wife for the calendar year 1950, an offense which is a felony. If you are not convinced that the defendant is guilty of this offense, but you are convinced beyond a reasonable doubt that he wilfully failed to pay his correct income tax for the year 1950, you may find him guilty of this lesser offense, which is a misdemeanor.”

Appellant concedes that the precise point presented here has been raised and rejected in *Dillon v. United States*, 218 F.2d 97 (C.A. 8, 1955), cert. granted 349 U.S. 914, cert. dismissed 350 U.S. 906. The Court of Appeals said (p. 100-101):

³“Section 145(a). Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, * * * be guilty of a misdemeanor * * *.”

(b) “Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony * * *.”

“Defendant was charged with a felony under Section 145(b), 26 U.S.C.A., Section 145(b). He requested an instruction that the jury might find him guilty of a lesser offense—specifically, a misdemeanor under Section 145(a), 26 U.S.C.A., Section 145(a), or Section 3616(a), 26 U.S.C.A. Section 3616(a). The request was denied. He contends that the lesser offenses defined in Section 145(a) and Section 3616(a) are included in the greater defined by Section 145(b) and that under Rule 31(c) of the Federal Rules of Criminal Procedure, he was entitled to the instruction. The pertinent portions of Section 145(a), Section 145(b) and Section 3616(a) are quoted in the footnote.

“As stated in *Spies v. United States*, 317 U.S. 492, 493, 63 S. Ct. 364, 365, 87 L.Ed. 418, ‘Section 145(a) makes, among other things, willful failure to pay a tax *or* make a return * * * a misdemeanor. Section 145(b) makes a willful attempt in any manner to evade or defeat any tax * * * a felony.’ The indictment did not charge, nor did the evidence show, that defendant merely failed to pay a tax or failed to make a return. On the contrary, the evidence showed that a return was filed and a tax was paid. No evidence was offered that defendant failed to file a return or to show the willful failure to pay the tax when due, except insofar as willfulness was involved in the charged willful and felonious attempt to evade the payment of taxes owed. Hence the universal rule that it is not error to fail to instruct on an offense not presented by the evidence applies. There consequently was no error in failing to instruct that defendant might have been convicted of either of the misdemeanors defined in Section 145(a), of

willful failure to pay a tax when due or willful failure to file a return * * *"

Although calling attention to the recent opinion in *Berra v. United States*, 351 U.S. 131, affirming 221 F.2d 590 (C.A. 8, 1955), appellant claims it is "clearly distinguishable." Prior to the Supreme Court's decision of that case, however, he told this Court in his "Memorandum of Points and Authorities in Support of Motion for Bail Pending Appeal" (p. 4):

"Substantially the same question was raised in *Berra v. United States* (C.A. 8, 1955), 221 F.2d 590, cert. granted December 5, 1955, 76 S.Ct. 190. There the defendant, who was similarly charged with an offense under Section 145(b) requested an instruction that the jury might find him guilty of the misdemeanor under Section 3616(a) of the Internal Revenue Code."

We agree with appellant's first appraisal of the *Berra* case; that it presents substantially the same question and answers it adversely to him.

Additionally, however, there are three separate reasons why the instruction was properly refused:

1. The offenses proscribed in Section 145(a) are separate and distinct from those condemned by Section 145(b) and are therefore not necessarily included within the latter. The theory of the "necessarily included" offense postulates a gradation in which the greater offense contains some aggravating element not found in the lesser. Whether an offense is "necessarily included" in another depends on a comparison

of the substantive elements of the two offenses. The lesser included offense must be in substance a lower grade of the offense charged. *Berra v. United States*, supra; *Stevenson v. United States*, 162 U.S. 313, 315. To be "necessarily included" the offense must be lesser in the sense that it contains the same, but not all, the elements of the greater offense. *Ekberg v. United States*, 167 F.2d 380, 385 (C.A. 1st 1948). See *I Wharton, Criminal Law* (12th Ed., 1932), Section 33. The offense of wilfully failing to pay a tax is not included within a wilful attempt to evade or defeat the tax, but is a separate offense requiring different proof. Cf. *United States v. Kafes*, 214 F.2d 887, 890-891 (C.A. 3rd 1954), certiorari denied, 348 U.S. 887. It seems clear that a taxpayer could be guilty of all the acts of omission proscribed by Section 145(a) without committing any affirmative act of evasion required to make out the felony. *Spies v. United States*, 317 U.S. 492, 498-499. It follows that violation of Section 145(a) is not "necessarily included" in a charged violation of Section 145(b) because the offenses are entirely separate and distinct, each involving elements of proof not required for the other.

2. There was no reasonable view of the evidence under which the jury could have acquitted the defendant of the felony and convicted him of the misdemeanor. One offense is not "necessarily included" in another merely because the proof might support his conviction of either offense. The purpose of Rule 31(c) is to enable the jury, where the evidence does not show the defendant to be guilty of the crime

charged, to find him guilty of a lesser “necessarily included” offense, if the evidence so permits. *Sparf v. United States*, 156 U.S. 51, 63. In the present case the jury could not possibly find that the defendant *wilfully* failed to pay his tax unless it found that he had knowingly and deliberately understated his tax liability in his return. But if it so found it would have been obligated to return a verdict of guilty of wilful attempted income tax evasion, since it would then have no reasonable doubt that all of the essential elements of the felony had been proved.

In other words, there was no basis of fact which could have warranted the jury in choosing as between a violation of Section 145(a) or of Section 145(b). The refusal of a requested instruction on an abstract proposition of law which is not sustained by the evidence in general is not error. *Benatar v. United States* (C.A. 9, 1954), 209 F.2d 734, cert. denied 347 U.S. 974; *United States v. Stoehr* (C.A. 3 1942), 196 F.2d 276, cert. denied 344 U.S. 826. As in *Dillon*, supra, the indictment did not charge, nor did the evidence show, that appellant merely failed to pay a tax. On the contrary, the evidence showed that a return was filed and a tax paid.⁴ Under the circumstances of the case, where the evidence tended to show the commission of the crime charged, it would have been proper for the Court to instruct the jury that there could be no conviction for a less included offense; *Sparf v.*

⁴So far as a defense was offered, it was based on the theory that appellant had not received the additional fees and therefore owed no additional tax (R. 36, 62).

United States, supra; and the included offense instruction should not be given unless justified by the evidence. *Burcham v. United States*, 163 F.2d 761 (App. D.C. 1947).

To show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which such instructions were properly applicable. *Sweeney v. Erving*, 228 U.S. 233, 242; *Bird v. United States*, 187 U.S. 118. "Appellant has not made nor attempted to make such showing. He has pointed out no evidence to which the requested instruction might have been applied. The burden of searching the evidence for such evidence rested upon appellant's counsel and should not be assumed by this Court." *Walton v. Wild Goose Mining & Trading Co.*, 123 F. 209, 219 (C.A. 9).

3. The requested instruction was so incomplete that it could only have resulted in hopelessly confusing the jury. It did not even make an attempt to define the essential elements of the misdemeanor; nor did it purport to provide the jury with standards for distinguishing between the two offenses, i.e., what aggravating element or elements are required for the felony but not the misdemeanor. It gave the jury no real guidance and in effect would have left the choice to the jury's caprice with little or no regard to the evidence.

The Court may refuse to charge a request which does not correctly embody the law applicable to the case, *Holmgren v. United States*, 217 U.S. 509, 523; and the instruction requested must be applicable to and based on evidence in the cause. *Lonergan v.*

United States, 88 F.2d 591 (C.A. 9, 1937); *Beavers v. United States*, 3 F.2d 860 (C.A. 6, 1925).

V. COSTS WERE PROPERLY TAXED.

The judgment of the District Court entered on January 13, 1956 allowed costs of prosecution to appellee (R. 6). On the same day appellee made application to the Clerk, pursuant to Rule 23 of the Rules of Practice, United States District Court, Northern District of California,⁵ for costs totalling \$987.50, including \$434.40 as fees to the Court Reporter for all or any part of the transcript necessarily obtained for use in the case (R. 10-11).

⁵Rule 23 provides, insofar as material, as follows:

(a) *Taxation of Costs.*

(1) *Application to the Clerk.* Within five days after notice of the entry of a judgment allowing costs, the prevailing party shall serve on the attorney for the adverse party and file with the Clerk an application for the taxation of costs. The application shall contain an itemized schedule of the costs and a statement signed by the attorney for the applicant that the schedule is correct and that the costs were necessarily incurred. The application shall be heard by the Clerk, not less than one nor more than three days after it is served, and notice of the time of hearing shall be endorsed upon it.

Upon failure to comply with this rule, all costs, other than the Clerk's costs, which may be inserted in the judgment without application, shall be waived.

(2) *Objections.* Upon the hearing, specific objections, supported by affidavits or other evidence, may be made to any item of costs. The Clerk shall thereupon tax the costs, and if there is no appeal, shall insert the amount of costs taxed in the blank left in the judgment, and also in the docket.

(3) *Review.* A dissatisfied party may take an immediate oral appeal to the Court from the decision of the Clerk if the opposing party is present; or may appeal upon written motion served within five days of the Clerk's decision, as provided in Rule 54(d), Federal Rules of Civil Procedure. Appeals shall be heard upon the same papers and evidence submitted to the Clerk.

On January 17, 1956, the time set for hearing on the cost bill, appellee appeared before the Clerk and, no objections being made by appellant, costs were taxed in full at \$987.50 (R. 11). Appellant filed his objections to costs on January 19, 1956 (R. 12-13), limited to the item of fees to the Court Reporter. On January 26, 1956 the Court entered an order allowing the cost upon the finding that the stenographer transcript was necessarily obtained by appellee for use in the trial of the case (R. 13-14).

Taxation of fees of the Court Reporter for the transcript furnished to the prevailing party is authorized by Title 28 United States Code, Section 1920(2) which specifically provides as follows:

“Section 1920. *Taxation of costs.*

“A judge or clerk of any court of the United States may tax as costs the following:

* * * * *

“(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;”

* * * * *

It is entirely within the discretion of the Court whether costs should be taxed at all in a non-capital criminal case. Title 28 United States Code, Section 1918 (b). The practice as to the imposition of costs is the same in criminal cases as in civil. *Bozel v. United States*, 139 F.2d 153 (C.A. 6, 1943), cert. denied 321 U.S. 800, rehearing denied 322 U.S. 768.

In *Perlman v. Feldmann* (D.C. Conn. 1953), 116 F.Supp. 102, the prevailing party was granted re-

imbursement for the average cost of a single copy of the daily transcript as being reasonably necessary for use on trial (the cost of additional copies was classed as incurred for convenience and was disallowed). In arriving at its decision the Court considers the historical background of the statute and concludes that if “* * * a trial transcript obtained by a party is not taxable, Paragraph 2 was a completely unnecessary addition to Section 1920 of the new Code * * *” (at page 108). In determining whether the transcript was “necessarily obtained”, the Court took into consideration such matters as the complication of the issues; the length of the trial (7 days); the assistance of the transcript to counsel in argument and to the Court in evaluating the various claims of fact asserted; and the extent of the use of the transcript by counsel as observed by the Court.

Judged by these same standards, it seems obvious that the transcript in the instant trial was necessary because of the length of the trial (6 days of testimony); the number of witnesses heard (20); the number and nature of the exhibits (68) the mathematical complexity of the evidence which required resort to the transcript for proper summation by the witness Brady and in closing argument; and the fact that the defendant purchased a copy of the transcript for his own use which required a similar purchase by the Government to protect its interests. The trial Court, from its own knowledge, can determine the extent of the necessity of such a transcript from personal observation during the trial.

The allowance of the expense of the transcript appears to depend in large part upon local practice and, in the jurisdictions for which cases on the point are available, the practice favors the granting of the cost of the transcript to the prevailing party. *Donato v. Parker Pen Company* (S.D. N.Y. 1945), 7 F.R.D. 148; *Brookside Theatre Corp. v. 20th Century-Fox Film Corp.* (W.D. Mo. 1951), 11 F.R.D. 259; *Stein v. Rosenthal* (S.D. Cal. 1952), 103 F.Supp. 227, at p. 232. (In the last cited case the Court allowed the basic cost of the transcript but ruled that the circumstances did not warrant the additional cost of a daily copy); *Weiss v. Smith* (D.C. Conn. 1952), 103 F.Supp. 736; *Kenyon v. Automatic Instrument Company* (W.D. Mich. 1950), 10 F.R.D. 248, at p. 254; *Eickhoff v. Vulcan Iron Works* (N.D. Pa. 1952), 2 F.R.D. 490.

In *Consolidated Fisheries Co. v. Fairbanks, Morse & Co.* (E.D. Pa. 1952), 106 F.Supp. 714, the Court allowed the costs of one copy of the transcript at non-daily rates and disallowed the charge for an extra copy.

The trial judge found that the stenographic transcript was "necessarily obtained" for use in the trial of the case. The statute requires no more. Absent a showing of a clear abuse of discretion, which appellant does not allege, the order should not be disturbed.

VI. APPELLANT'S FAILURE TO SUFFICIENTLY
DESIGNATE THE RECORD.

One additional matter should be called to the attention of the Court. Appellant has indulged in a practice which is threatening to become endemic in this Court. Despite the requirements of Rule 17(6) of the Rules of this Court requiring appellant to file a designation of "all of the record which is material to the consideration of the appeal", he failed to have printed any testimony except that of the witness Brady who merely computed the tax. In this case the Government, in order that the Court might be informed as to the facts of the case, was forced to submit to the inconvenience and expense of printing 53 pages of the record. Among other things, appellant argues that the Court should have instructed concerning an allegedly lesser and included offense. It is difficult to see how the Court could come to any conclusion in this respect without the facts of the case before it. It appears, therefore, that appellant's failure was material to this Court's consideration of the appeal. However, appellant, in this case, as has been done in other cases (*Kremen et al. v. United States*, No. 14,359, for example) apparently relies on Rule 25(4) of the Court which appears not to permit allowance of the government's costs. We invite the Court to consider whether this means of transferring the costs of appeal to the Government is within the spirit of the Rules of the Court of Appeals for the Ninth Circuit. We particularly draw the Court's attention to Rule 17(6) providing *inter alia* "If at the hearing it shall appear that any material part

of the record has not been printed, the appeal may be dismissed, or *such other order made as the circumstances may appear to the court to require.*" (Emphasis added.)

CONCLUSION.

For the reasons stated, the judgment and order appealed from should be affirmed.

Dated, San Francisco, California,
June 18, 1956.

LLOYD H. BURKE,

United States Attorney,

JOHN LOCKLEY,

Assistant United States Attorney,

Attorneys for Appellee.

No. 15040

United States
Court of Appeals
for the Ninth Circuit

D. M. HAGGARD and NILA HAGGARD,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

MAY -7 1956

PAUL P. O'BRIEN, CLERK



No. 15040

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

For Petitioners:

CHARLES K. RICE,
Acting Asst. U. S. Attorney General,
LEE A. JACKSON,
Attorney,
Department of Justice,
Washington 25, D. C.

For Respondents:

McLANE & McLANE,
806 Security Building,
Phoenix, Arizona.



The Tax Court of the United States

Docket No. 50625

D. M. HAGGARD and NILA HAGGARD,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances: For Petitioners: W. Lee McLane, Jr.,
Esq., Nola McLane. For Respondent: Arthur
Clark, Jr., Esq.

DOCKET ENTRIES

1953

Sept. 14—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 16—Copy of petition served on General Counsel.

Sept. 14—Request for Circuit hearing in Los Angeles, Calif., filed by taxpayer. 9/21/53—Granted.

Oct. 21—Answer filed by General Counsel.

Oct. 21—Request for hearing in Los Angeles, Calif., filed by General Counsel.

Oct. 27—Copy of answer and request served on taxpayer, Los Angeles, Calif.

1955

Jan. 10—Hearing set March 21, 1955, Los Angeles, Calif.

1955

Mar. 17—Appearance of Nola McLane, as counsel filed.

Mar. 24—Hearing had before Judge Fisher, on the merits. Briefs due May 9, 1955; Replies due June 8, 1955.

Apr. 18—Transcript of Hearing 3/24/55 filed.

May 2—Motion for extension of time to May 20, 1955, to file brief, filed by taxpayer. 5/3/55—Granted.

May 5—Motion for extension of time to June 8, 1955 to file brief, filed by General Counsel. 5/6/55—Granted.

May 13—Brief filed by taxpayer. 6/7/55—Copy served.

June 6—Brief filed by General Counsel.

June 27—Reply Brief filed by taxpayer. Copy served.

July 8—Reply Brief filed by General Counsel.

Sept. 28—Findings of Fact and Opinion filed. Judge Fisher. Decision will be entered under Rule 50. 9/28/55 Copy served.

Nov. 7—Agreed Computation filed.

Nov. 9—Decision entered, Judge Fisher, Div. 15.

Dec. 28—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by petitioner.

Dec. 28—Proof of Service filed.

Dec. 28—Designation of contents of record with service acknowledged thereon, filed.

1956—Jan. 6—Designation of Additional Portions of Record with statement of service by mail thereon, filed.

Jan. 25—Order extending time to March 27, 1956 for filing the record and docketing the appeal entered.

[Title of Tax Court and Cause.]

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (D:ARIZ:R:HL:oh 90-D) dated July 24, 1953, and as a basis of their proceeding allege as follows:

1. Petitioners are individuals residing at 1115 West Edgemont, Phoenix, Arizona. The return for the period here involved was filed with the Collector of Internal Revenue at Phoenix, Arizona.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on July 24, 1953.

3. The deficiency as determined by the Commissioner is in income taxes for the calendar year 1949 in the amount of \$3,480.96 of which the entire amount is in dispute.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following error of the Commissioner:

(a) In disallowing a deduction of \$12,000 claimed by petitioners as a rental expense during 1949.

5. The facts upon which the petitioners rely as a basis of this proceeding are as follows:

(a) Petitioner D. M. Haggard rented 160 acres of farm land from the fee owner at a rental of \$12,000 for the year 1949.

(b) Said land was rented under the terms of a written lease agreement executed by the fee owner and petitioner D. M. Haggard which agreement provided that petitioner D. M. Haggard had the use of the land for approximately two years.

(c) The above lease agreement required the payment of \$12,000 as rent for the use of the land during 1949.

(d) Simultaneously with the execution of the lease agreement, the petitioner D. M. Haggard and the fee owner executed an option to purchase the land which option granted petitioner D. M. Haggard the right to purchase the 160 acres on January 1, 1950 for a purchase price of \$24,000.

(e) The said option to purchase was exercised by petitioner D. M. Haggard on January 1, 1950, and title to the 160 acres passed to petitioners at that time.

(f) The amount of \$12,000 paid by petitioners for the use of the 160 acres during 1949 constituted rent, and petitioners acquired no title or equity in the land prior to the exercise of the option to purchase on January 1, 1950.

Wherefore, petitioners pray that this Court may

hear this matter and determine that the Commissioner erred in disallowing the rental deduction of \$12,000 claimed by the petitioners, and therefore erred in asserting a deficiency of \$3,480.96 in income tax due for 1949, and as a result of such error, petitioners are entitled to a refund of \$756.76 from the Commissioner.

/s/ W. LEE McLANE, JR.,

Counsel for Petitioners

Duly Verified.

EXHIBIT "A"

D:ARIZ:R-HL:oh-90-D

July 24, 1953

Mr. D. M. Haggard

Mrs. Nila Haggard

1115 West Edgemont, Phoenix, Arizona

Dear Mr. and Mrs. Haggard:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1949, discloses a deficiency of \$3,480.96, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia

in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Director of Internal Revenue, Audit Division, 140 West Monroe Street Building, Phoenix, Arizona. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews, Commissioner
By Wilson B. Wood, District Director of
Internal Revenue

Enclosures: Statement, Form 1276, Agreement
Form 870

Mr. D. M. Haggard and Mrs. Nila Haggard, Husband and Wife, 1115 West Edgemont, Phoenix, Arizona.

Tax Liability for the Year Ended
December 31, 1949

Deficiency in income tax.....\$3,480.96

In making this determination of your income tax

liability, careful consideration has been given to the report of examination dated January 27, 1953 and to supplemental report of examination dated April 15, 1953.

A copy of this letter and statement has been mailed to your representative, Mr. W. Lee McLane, Jr., 808 Security Building, Phoenix, Arizona, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$ 19,867.74
Unallowable deductions and additional income:	
(a) Agreed adjustments—report dated 12-12-50.....	3,300.20
(b) Rent deductions disallowed	12,000.00
	<hr/>
Total.....	\$ 35,167.94
Additional deductions:	
(c) Partnership distribution decreased	2,509.50
	<hr/>
Net Income, as adjusted.....	\$ 32,658.44
	<hr/> <hr/>

EXPLANATION OF ADJUSTMENTS

(a) Self-explanatory.

(b) It has been determined that the deduction of \$12,000.00 claimed as rental expense was in the nature of a capital expenditure for the purchase of real estate. Accordingly, the deduction claimed of \$12,000.00 is not allowable as a business expense.

(c) This adjustment is based on report dated September 5, 1952, covering the investigation of the Pecos Sales Company, Roswell, New Mexico, a partnership in which you own a third interest. Your distributive income from said partnership was decreased by \$2,509.50, as shown by the following computation:

Amount reported	\$ 17,752.52
Corrected, per above-mentioned report	15,243.02
	<hr/>
Net decrease	\$ 2,509.50
	<hr/> <hr/>

The above adjustment conforms with the information contained in your claim for refund filed on January 9, 1953 and is in accordance with the amount allowed in supplemental report of investigation dated April 15, 1953.

COMPUTATION OF TAX

Net income, as adjusted	\$ 32,658.44
Less: 5 exemptions	3,000.00
Total	29,658.44
One-half	14,829.22
Tentative tax	4,649.73
Less: Percentage reduction:	
\$400.00 at 17%	\$ 68.00
\$4,249.73 at 12%	509.97
	577.97
Normal tax and surtax	4,071.76
Correct income tax liability (multiplied by 2)	8,443.52
Less:	
Liability per return	\$3,669.24
Deficiency assessed December, 1950.....	933.32
	4,662.56
Deficiency in income tax	\$ 3,480.96

[Endorsed]: T.C.U.S. Filed September 14, 1953.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and subparagraph (a) thereof.

5. Denies the allegations contained in paragraph 5 of the petition and all subparagraphs thereof.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ KENNETH W. GEMMILL,
Acting Chief Counsel, Internal
Revenue Service

Of Counsel:

B. H. Neblett, Regional Counsel,
E. C. Crouter, Acting Appellate Counsel,
Clayton J. Burrell, Special Attorney, Internal
Revenue Service.

[Endorsed]: T.C.U.S. Filed October 21, 1953.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

(Filed September 28, 1955)

Petitioners entered into agreements in the form of a lease and option to purchase with respect to a parcel of land to be used in conducting their farm-

ing and ranching business. Under the agreements, petitioners were to pay \$10,000 for the year 1948 and \$12,000 for the year 1949 as "rent," and \$2,000 for the option to purchase the property thereafter for \$24,000. Respondent disallowed the deduction of the so-called rental payment for the year 1949 on the ground that it did not qualify as rental expense within the meaning of section 23(a)(1)(A) of the Internal Revenue Code of 1939. Held, that petitioners, through the said payment, which was excessive in relation to the fair rental value of the property, intended to and did acquire an equity in the property.

W. Lee McLane, Jr., Esq., for the petitioners.

Arthur Clark, Jr., Esq., for the respondent.

The respondent determined deficiencies in petitioners' income tax for the taxable year 1949 in the sum of \$3,480.96 by disallowing a deduction of \$12,000 claimed by them as rental expense paid for the use of 160 acres of farm land. The only question presented is whether the payment by petitioners made under the "lease" was in fact rent or whether it constituted a partial payment on the purchase price of the property by means of which petitioners acquired an equity therein.

Findings of Fact

Petitioners D. M. Haggard and Nila Haggard are husband and wife, residing in Phoenix, Arizona. The income and deductions here in issue were reported by petitioners on their return for 1949 filed

with the collector of internal revenue for the district of Arizona.

Petitioners are engaged in operating a ranch in Maricopa County, Laveen, Arizona, consisting of approximately 1,500 acres. In early 1948, petitioners owned 1,340 acres, some of which adjoined acreage owned by John Butler. On February 9, 1948, Butler contacted Haggard, hereinafter sometimes referred to as petitioner, to ascertain if he was interested in purchasing 160 acres of farm land for \$48,000. Petitioners had formerly tried to purchase the same property for approximately \$100 to \$150 per acre. After some discussion, Butler and Haggard went to the office of petitioners' attorney. Butler agreed to the suggestion of petitioners' attorney that the transaction be handled by the execution of a "Lease" (under the terms of which petitioners would rent the property for the balance of 1948 for \$10,000 and \$12,000 for the year 1949) and an "Option" (for a separate consideration of \$2,000) under the terms of which petitioners would have the right to purchase the 160 acres after January 1, 1950, and before January 10, 1950, for the sum of \$24,000. Butler was concerned about the possible tax consequences of the proposed transaction, but was assured that the entire transaction was properly reportable for income tax purposes as a sale. Later, on the same day, the parties returned to Merrill's office and the "Lease" and "Option" agreements were executed simultaneously.

The pertinent provisions of the "Lease" are as follows:

To Have And To Hold the same to the said Lessees from date hereof to the 31st day of December, 1949.

And said Lessees, in consideration of the leasing the premises as above set forth, covenant and agree with the Lessors to pay the said Lessors as rent for the same the sum of Twenty-Two Thousand and no/100 (\$22,000.00) Dollars, payable as follows, to-wit: The sum of Ten Thousand Dollars (\$10,000.00) payable upon the execution of this Lease, receipt whereof is hereby acknowledged by Lessors, and the further sum of Twelve Thousand Dollars (\$12,000.00) on the 1st day of January, 1949.

* * * * *

It Is Mutually Understood and Agreed that during the term of this Lease, Lessees shall pay all taxes and assessments accruing [sic] against the said property.

* * * * *

The pertinent provision of the "Option" are as follows:

That John Butler and Hester D. Butler, husband and wife of Maricopa County, State of Arizona, for and in consideration of the sum of Two Thousand and no /100 (\$2,000.00) Dollars to them in hand paid by D. M. Haggard of Maricopa County, Arizona, receipt of which is hereby acknowledged, hereby give, grant and by these presents do give and grant irrevocably, unto the said D. M. Haggard, his heirs and assigns, the right and option to purchase, acquire, receive and assume possession of the fol-

lowing described real estate and property, to-wit:

* * * * *

This Option is given exerciseable [sic] as of the 1st day of January, 1950, and for a period of not to exceed ten days thereafter, and shall be exercised by Notice of Election to purchase hereunder by the said D. M. Haggard or his heirs or assigns, in writing to the said John Butler and/or Hester D. Butler, husband and wife, their heirs, administrators or executors, at least thirty days prior to any day within said eleven day period, and in case said notice shall be given in due time, then the said John Butler and Hester D. Butler agree to immediately execute and deliver a good and sufficient deed to purchaser together with Title Guaranty, * * *

The purchase price for said property is the sum of Twenty-Four Thousand and no/100 (\$24,000.00) Dollars payable upon election to purchase, which said purchase price shall be accepted, received and acknowledged by Sellers in full payment therefor.

* * * * *

The property in question was originally purchased by Butler in November 1945, for a total price of \$40,000, \$10,000 down and the remaining balance in annual installments of \$5,000. During 1946 Butler farmed the property, earning a profit of between \$25 to \$30 per acre or \$4,000 to \$4,800 from the entire farm property. The following year he rented out the 160 acres for \$4,000, but was required to pay \$156 in assessments plus taxes and thus obtained a net profit of about \$3,844 for that year. The net profit was less than the annual pay-

ment of \$5,000 plus interest which was due on the purchase price. At the end of 1947, Butler had made a total profit of from \$7,844 to \$8,644 for the two years during which he owned the property. During the same period, he paid the mortgagee \$10,000 plus interest for two years.

In late 1947 or early 1948, the mortgagee was pressing Butler for an over-due payment on the purchase price of the property. To meet this obligation, Butler listed the 160 acres of farm land with a Phoenix realtor at \$48,000. A number of prospective purchasers responded to this listing but none made an acceptable offer to buy until the first week in February 1949. About February 2, 1949, a week before the execution of the "Lease" and "Option" agreements with petitioner, Butler received an offer from the son and son-in-law of one Talby to purchase the property for \$48,000. The terms of the offer were \$8,000 down and the balance in ten equal payments. Before accepting the proposal, Butler, realizing that petitioners owned acreage adjacent to the property, decided to offer the land to them. In the event they were not interested in the "deal," Butler intended to accept the existing proposition. Thereafter, on February 9, 1948, Butler met with petitioners in Phoenix, Arizona, to discuss the "deal." Later that day they executed the "Lease" and "Option" agreements, and pursuant to the "Lease," on that same day petitioners paid Butler \$10,000 as "rent." On January 1, 1949, petitioners paid Butler the other \$12,000 rental payment.

In 1947, the fair or reasonable rental for the property would have been from \$3,000 to \$4,000 a year. In February 1948, the rental that could reasonably have been expected from this property would have been about \$5,000 a year.

On April 1, 1949, Butler borrowed \$12,000 from the Valley National Bank of Phoenix, Arizona, and mortgaged the property as collateral. On the same day, petitioners, as optionees of the property, executed a "subordination agreement" in which they agreed that their option would be subordinate to a mortgage on the property, Butler and his wife being the mortgagors, and the Valley National Bank of Phoenix the mortgagee.

The proceeds of this loan were used by Butler, in part, to pay off the existing mortgage on the property. On January 20, 1950, after petitioners assumed the entire amount Butler owed to the Valley National Bank, and paid Butler the final sum of \$12,000, a warranty deed was executed by Butler conveying title to the property to petitioners.

Following the execution of the "Lease" and "Option" agreements, Butler retained a firm of certified public accountants in Phoenix, Arizona, to prepare his 1948 Federal income tax return. Butler was advised to report the transaction as a sale and on Butler's income tax return for 1948, the "Lease" and "Option" agreements were so treated. One-half of the net gain was reported as taxable.

Petitioners, on the other hand, treated the sum of \$12,000 paid to Butler on January 1, 1949, as

rental expense, payable pursuant to the "Lease," and deducted this amount from their gross income. Respondent determined that this payment constituted an installment on the purchase price of the property, and was not deductible under section 23(a)(1)(A) of the Internal Revenue Code of 1939.

Petitioners, through the annual "rental" payments, were intending to and did in fact build up a substantial equity interest in the 160-acre farm tract.

Opinion

Fisher, Judge: The respondent has disallowed a deduction of a payment made by petitioners under a "Lease," executed in conjunction with an "Option" to purchase, on the ground that the payment was not rental expense within the meaning of section 23(a)(1)(A) of the Internal Revenue Code of 1939, which restricts deductions to rentals or other payments for the use or possession of property "to which the taxpayer has not taken or is not taking title or in which he has no equity." The sole issue to be decided is whether the so-called "rental" payment was in fact a payment of rent under the lease and deductible as such, or a partial payment of the purchase price of the property. We hold for the respondent for the reasons stated hereinafter.

Petitioners contend that they did not acquire an equity interest in the property as a result of the \$12,000 payment under the lease agreement because the fair market value of the property when the "Lease" was executed was considerably less than the

agreed purchase price under the "Option." They further argue that only the economic relation of the value of the property existing at the time the documents were executed is determinative of the issue here, and that the intention of the parties is only supplemental, if relevant at all. The precise problem posed of characterizing a payment made pursuant to a lease-option arrangement has been before this Court on numerous occasions, and regardless of the form or nomenclature of the transaction, we have treated similar "rental" payments as partial payments of the purchase price of the property involved, if by virtue of the payment the taxpayer has acquired, or will acquire title to or an equity in the property. *Alexander W. Smith, Jr., Executor*, 20 B.T.A. 27 (1930); *Chicago Stoker Corporation*, 14 T.C. 441 (1950). The principle extending throughout the cases heretofore decided by us on like issues is that where the "lessee" as a result of the "rental" payment, acquires something of value in relation to the over-all transaction, other than the mere use of the property, he is building up an equity in the property, and the payments do not, therefore, come within the definition of rent in section 23(a)(1)(A), *supra*. *Judson Mills*, 11 T.C. 25 (1948); *Truman Bowen*, 12 T.C. 446 (1949).

The most recent consideration of this issue was in *Bruce Veneer & Panel Co.*, 22 T.C. 1386 (1954) (on appeal C.A. 7). There, petitioner entered into a "Lease" and "Option to Purchase" agreement with the R.F.C. with respect to certain property, in part of which it was at the time conducting its business.

Under the agreement, petitioner was to pay "as rent" \$100,000 in 60 monthly installments, after which it had the option to purchase the property for \$50,000. The Court held, despite the explicit language of the lease agreement, that since the "rental" payments materially exceeded the current fair rental value of the property, and since the aggregate payments paid prior to the exercise of the option were disproportionate to the relatively small final amount required to acquire title, petitioner was building up a substantial equity interest in the property, as intended by the parties, and that the payments, in reality, were being applied to the agreed purchase price of the property. We are of the opinion that the rationale there expressed is applicable here. *Judson Mills, supra*; *Robert A. Taft*, 27 B.T.A. 808, 812 (1933); *Holeproof Hosiery Co.*, 11 B.T.A. 547 (1928).

We pointed out in *Bruce Veneer and Panel Co.*, *supra*, and *Chicago Stoker Corporation, supra*, that the payments there in question (as in the instant case) may have dual potentialities, that is, they may emerge as partial payments of the agreed purchase price on the one hand or rent for the use of the property on the other. As emphasized in those cases, it is difficult to categorize the payments for income tax purposes. To properly discern the true character of the payment, therefore, it is necessary to ascertain the intention of the parties as evidenced by the written agreements, read in the light of the attending facts and circumstances existing at the time the agreement was executed.

Here, the record shows that Butler had purchased the property in 1945 for \$40,000. In 1948 he was primarily interested in selling it, and listed the property with a realty firm for a price of \$48,000. At the time he contacted petitioners, he had an offer from the Talby group for that amount and was prepared to sell to them on the basis of a down payment of \$8,000 with the balance in ten equal annual payments if he could not arrange with petitioners on more favorable terms at least as to deferred payments. The total sums paid by petitioners precisely equalled the same amount of \$48,000, and we think it clear, upon consideration of the whole record, that at the time the agreements were executed, Butler would not have considered making an outright sale for \$24,000. We likewise think it is clear that the payments in 1948 and 1949 were in excess of the fair rental value of the property and were fixed at amounts which, when added to the option payment of \$2,000 and the ultimate "sale price" of \$24,000, would equal the \$48,000 which Butler demanded.

In support of petitioners' position that they did not acquire an equity in the property as a result of the "rental" payment, they argue that the fair market value was below a reasonable estimate of the property's future worth. They urge that the property on February 9, 1948, had a fair market value not in excess of \$21,750 and the agreed purchase price established by the "Option" was \$24,000. The figure of \$21,750 urged as the fair market value was based upon the testimony of an expert witness pro-

duced by petitioners. An analysis of his testimony demonstrates that the valuation so suggested is not to be accepted as determinative. It is, of course, widely at variance with what both the Talby group and petitioners were willing to pay. The witness pointed out a number of circumstances which might have resulted in greatly differing valuations of the property as a whole, and a variance of as much as 100 per cent in rental value. Moreover, he testified that in valuing the property he had given no consideration to the significant factor of the right to the use of water which was essential to the productivity of the land. His reason for this omission was his assumption that such right was not "appertinent" to the land in question. He made it clear that if such right was appertinent, the value thereof must be added to his valuation of \$21,750. He did not, however, testify what the value of such a right was, and there is no other testimony in the record from which it might be determined, so that we have no basis on his evidence to find a total fair market value including such right.

The burden of proof was, of course, upon petitioners. The record fails to establish whether or not there was a right (appertinent to the land) to the adequate use of water. It is clear from a consideration of the whole record, however, that there was some arrangement for water supply which was satisfactory to petitioners. We add that we think it reasonable to assume that an experienced farmer like Haggard, who was familiar with the particular property, its requirements, and conditions in the

area in which it was located, would not otherwise have entered into the transaction.

In view of the foregoing, we cannot accept the the valuation suggested by the expert witness. On the other hand, while subject in each instance to some deferment of payment, we have a precise amount which two willing buyers were willing to pay, and which Butler, a willing seller, was willing to accept. For the purposes of this case we are not required to determine an exact valuation. No doubt the price of \$48,000 may have been subject to some discount if the entire transaction had been for cash. We think it clear, however, that the value was much closer to \$48,000 than it was to \$21,750. Even if the discount for cash would have been as much as 20 per cent (which we doubt), the payments by petitioners in 1948 and 1949 would have been clearly in excess of fair rental value and would have served to create an equity in the property of which Haggard was in a position to avail himself under the terms of the agreements. We add that, while petitioners' expert witness testified to widely varying potential rental values depending upon varying circumstances, we think that, upon his testimony, the fair rental value, for the practical purposes confronting us, was not in excess of \$5,000 for 1948 or 1949.

A significant aspect of the over-all transaction indicative of petitioners' intent to acquire an equity interest in the property is the fact that, under the lease, the aggregate of the "rental" payments con-

stituted 91 per cent of the purchase price stated in the option. Moreover, the total of annual "rental" payments of \$22,000 is about 46 per cent of the total considerations passing from Haggard to Butler under the terms of the contracts. We think it evident that a rental charge so disproportionate to the term of user in relation to the fair market value of the property is suggestive of the acquisition of an equity interest. Truman Bowen, *supra*, 463.

Petitioners rely strongly upon *Benton vs. Commissioner*, 197 F.2d 745, 751 (C.A. 5-1952). The factual situation in the instant case differs materially from that in the *Benton* case, which, in our opinion, is not here controlling.

In the light of the foregoing and upon consideration of the record as a whole, we are convinced that through the annual rental payments petitioners were in fact acquiring a substantial equity in the property, and that it was so intended by the parties. Accordingly, we hold that the payment in question is not deductible under section 23(a)(1)(A), *supra*, and the respondent did not err in disallowing the claimed deduction therefor.

Decision will be entered under Rule 50.

Served September 28, 1955.

The Tax Court of the United States
Washington

Docket No. 50625

D. M. HAGGARD and NILA HAGGARD,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed September 28, 1955, the parties on November 7, 1955, having filed an agreed computation of the tax, it is

Ordered and Decided: That there is a deficiency in income tax in the amount of \$3,480.96 for the taxable year 1949.

/s/ MORTON P. FISHER,
Judge

Entered and Served November 9, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Cause No. 50625.]

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

D. M. Haggard and Nila Haggard, the petitioners in this cause, by W. Lee McLane, Jr. and Nola McLane, their counsel, hereby file their Petition for the Review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States, entered on November 9, 1955, T. C. Docket No. 50625, determining a deficiency in petitioners' Federal income tax for the calendar year of 1949 in the amount of \$3,480.96, and respectfully shows:

I. Jurisdiction

The petitioners on review, at the time of filing of this petition, are citizens of the United States and reside at 1115 West Edgemont Avenue, Phoenix, Arizona. The return of income tax in respect of which the aforementioned tax liability arose was filed by the petitioners with the Collector of Internal Revenue for the District of Arizona, located in the City of Phoenix, Arizona, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The petitioners file this petition pursuant to the

provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II. Nature of Controversy

The controversy involves the proper determination of petitioners' liability for Federal income tax for the calendar year of 1949.

On February 9, 1948, petitioners executed two instruments. One was entitled a "Lease" and the other was entitled "Option". Each involved a certain tract of farm land owned by John Butler of Laveen, Arizona. Under the terms of the document designated "Lease", John Butler agreed to let his 160 acres to petitioners until December 31, 1949. The consideration specified by the instrument to be paid by petitioners to Mr. Butler was \$10,000 on February 9, 1948, and \$12,000 on January 1, 1949. The said sums were paid. The document entitled "Option" provided that petitioners thereby acquired an option to purchase the 160 acres for \$24,000 which option could be exercised as of January 1, 1950, and for a period not exceeding ten (10) days thereafter. The consideration required by the "Option" to be paid by petitioners was \$2,000. The sum was paid. Both of the documents were drafted and prepared by petitioners' attorney who was a Mr. J. D. Merrill.

On April 1, 1949, John Butler borrowed \$12,000 from the Valley National Bank in Phoenix, Arizona, giving as security therefor a mortgage on the said 160 acres of farm land. At the same time petitioners executed a document subordinating their

“Option” to the Valley National Bank’s mortgage.

The sum of \$12,000 required to be paid under the terms of the “Lease” agreement during 1949 was claimed by petitioners as a deduction under the authority of Section 23(a)(1)(A) of the Internal Revenue Code of 1939. In January of 1950, petitioners exercised the said option for a purchase price of \$24,000, and acquired the fee title to Mr. Butler’s 160 acres. Respondent disallowed the \$12,000 deduction for the taxable year 1949 in a statutory notice of deficiency dated July 24, 1953, stating that:

“(b) It has been determined that the deduction of \$12,000.00 claimed as rental expense was in the nature of a capital expenditure for the purchase of real estate. Accordingly, the deduction claimed of \$12,000.00 is not allowable as a business expense.”

The Tax Court sustained the respondent’s holding that the \$12,000 was not deductible under Section 23(a)(1)(A) because (1) the amount exceeded the fair rental value of the 160 acres thereby resulting in the acquisition of an equity interest in the property, and (2) the petitioner intended to acquire an equity in the 160 acres.

III. Assignments of Error

The petitioners assign as error the following acts and omissions of The Tax Court of the United States:

(1) The Tax Court erred in determining that the sole issue was whether the \$12,000.00 payment was in fact a payment of rent.

(2) The Tax Court erred in holding that where a "lessee" acquires "something of value" in relation to the overall transaction, the "rental" payment does not come within the definition of rent in Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

(3) The Tax Court erred in relying on *Breece Veneer & Panel Co.*, 22 T.C. 1386 (1954), (on appeal C. A. 7th).

(4) The Tax Court erred in holding that when rental payments materially exceed the current "fair rental value" of the property "leased" and where the total payments made prior to the exercise of the option are disproportionate to the relatively small final amount required to acquire title, the "lessee" is building up a substantial equity interest in the property, as intended by the parties, and the payments in reality are being applied on the agreed purchase price of the property.

(5) The Tax Court erred in finding that the intention of Mr. Butler and petitioners was to effectuate a sale on February 9, 1948.

(6) The Tax Court erred in finding that the value of the 160 acres on February 9, 1948 was not \$21,750.00.

(7) The Tax Court erred in finding that the fair rental value of the 160 acres did not exceed \$5,000 for 1948 or 1949.

(8) The Tax Court erred in its holding that petitioners did not carry their burden of proof with respect to the fair market value of the 160 acres on February 9, 1948.

(9) The Tax Court treated as evidence the legal

presumption of correctness attaching to the Commissioner's determination.

(10) The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

Wherefore the petitioners pray that the decision of The Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Petitioners on Review

[Endorsed]: T.C.U.S. Filed December 28, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Cause No. 50625.]

NOTICE OF FILING PETITION
FOR REVIEW

To: John P. Barnes, Chief Counsel, Bureau of
Internal Revenue, Washington, D. C.

You are hereby notified that the petitioners did, on the 28th day of December, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of said Court heretofore rendered in the above entitled case. A copy of the peti-

tion for review as filed is hereto attached and served upon you.

Dated this 22nd day of December, 1955.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Petitioners on Review

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed December 28, 1955.

The Tax Court of the United States
Washington

[Title of Cause No. 50625.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit is extended to March 27, 1956.

Dated: Washington, D. C., January 25, 1956.

[Seal] /s/ J. E. MURDOCH,
Chief Judge

Served: January 26, 1956.

[Title of Tax Court and Cause No. 50625.]

CERTIFICATE

I, Howard P. Locke, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 13, inclusive, constitute and are all of the original papers and proceedings, on file in my office as called for by the "Designation of Contents of Record on Review" and "Designation of Additional Portion of Record", including Petitioners' exhibits 1 through 9 and exhibit 18 admitted in evidence and Respondent's exhibits A, B, C and D admitted in evidence, as the original and complete record in the proceeding before The Tax Court of the United States entitled: "D. M. Haggard and Nila Haggard, Petitioners, vs. Commissioner of Internal Revenue, Respondent, Docket No. 50625" and in which the petitioners in the Tax Court proceeding have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appeal in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of January, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, The Tax Court of the
United States

In the Tax Court of the United States

Docket No. 50625

D. M. HAGGARD and NILA HAGGARD,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 9, Federal Building, Los Angeles,
California, Thursday, March 24, 1955.

The above-entitled matter came on for hearing,
pursuant to notice to the parties, at 10:00 o'clock
a.m.

Before: Honorable Morton P. Fisher, J., pre-
siding.

Appearances: W. Lee McLane, Jr., Esq., of Mc-
Lane & McLane, 808 Security Building, Phoenix,
Arizona, for the petitioners.

Arthur Clark, Jr., Esq., (Hon. Daniel A. Taylor,
Chief Counsel, Internal Revenue Service), for the
respondent. [1*]

The Clerk: D. M. Haggard and Nila Haggard,
Docket 50625. State your appearances for the rec-
ord, please.

Mr. McLane: W. Lee McLane, Jr., for peti-
tioners.

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

Mr. Clark: Arthur Clark, Jr., for the respondent.

The Court: You may proceed.

Mr. McLane: I think Mr. Clark has an exhibit.

Mr. Clark: Your Honor, this case involves a question of substance over form and there may be a conflict as to the testimony. We believe that the witnesses should be excluded and would like them to leave the room.

The Court: Any objection, Mr. McLane?

Mr. McLane: No, sir, no objection.

The Court: All right, Mr. Casey, you will have to use your ingenuity to exclude the witnesses.

The Clerk: All witnesses come with me.

The Court: Mr. Clark, do you have any affirmative testimony?

Mr. Clark: Yes, sir.

The Court: Are your witnesses excluded in the exclusion?

Mr. Clark: Yes, sir.

The Court: All right. None of the gentlemen in the rear of the room are witnesses for either side, is that correct?

Mr. McLane: Mr. Haggard will be a witness, your Honor, but, if it is agreeable, we can hold him until he takes the [3] stand or do you want him out of the room, too?

The Court: I don't know very well how he is going to testify if he isn't in here, so I guess we can hold him. He is going to be your first witness?

Mr. McLane: Yes, sir, he is.

The Court: All right. Proceed with the opening statement.

Mr. McLane: May it please the Court, this case arises out of a difference of opinion concerning the application of that portion of Section 23(a)(1)(A) of the 1939 Internal Revenue Code which allows a deduction for "rentals or other payments required to be made as a condition to the continued use or possession, for purposes of trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity." The taxable year involved is 1949.

Petitioners believe the evidence will show that on February 9, 1948, D. M. Haggard, a farmer, leased 160 acres of farm land from John Butler for the years 1948 and 1949, for a rental payment of \$10,000 and \$12,000 respectively. The evidence will further show that he elected to exercise a written option to purchase the same 160 acres on approximately January 7, 1950, for the sum of \$24,000.

It is petitioners' contention that the sum of \$12,000 paid during 1949 constituted either "rental" or "other payments required to be made as a condition to the continued use or possession * * * of property." Further, they contend that they [4] had neither taken title to the property in 1949 nor were they taking title to it during that year. Thirdly, they submit to the Court that they had no economic equity in the property either on February 9, 1948, during 1949, or on the day just prior to the exercise of the option on January 7, 1950.

Before concluding, counsel desires to respectfully

submit to the Court one additional point. Rule 32 of this Court's rules places the burden of proof on petitioners.

Therefore, it seems only equitable that petitioners should be entitled to some small glimpse, before trial and before briefs are submitted, of what the respondent believes constitutes that burden. To date, respondent has not revealed his view of the facts or the law in any degree.

Petitioners do not know, at this time, whether it is respondent's position that petitioners had an economic equity in the property during 1949 or that they were taking or had taken title to the 160 acres during that year.

Consequently, since this is not a contest between lawyers, but an effort to determine the truth, petitioners' counsel respectfully requests that respondent state, just as petitioners have done, what his view of the facts and law in this case is.

The Court: Mr. McLane, as I understood it, in one year, there was \$12,000 rent paid.

Mr. McLane: Yes, sir.

The Court: And then an option was exercised to purchase [5] that for \$24,000. Was that \$24,000 in addition to the \$12,000 or was the \$12,000 a credit on account of the \$24,000?

Mr. McLane: No, it was not a credit. Actually, there was a lease—strike the word "lease." I don't want to use that term. There was an agreement entered on February 9, 1948, by which Mr. Haggard was required to pay the sum of \$10,000 for the use of the property during '48. He was also required to

pay the sum of \$12,000 for the year '49, which is the year before the Court. Then, there was an option to purchase exercised—excuse me—granted on February 9, 1948, by which, if he elected to exercise that option, he could purchase the property between January 1st and January 10th of 1950 for the sum of \$24,000, which sum was in addition to the \$12,000 payment made during 1949 and the \$10,000 paid during 1948.

In other words, a total amount of \$48,000 was paid to Mr. Butler.

The Court: \$48,000 or \$46,000?

Mr. McLane: \$48,000, including a \$2,000 option price.

The Court: All right. Mr. Clark?

Mr. Clark: Your Honor, the disallowance of the rental deduction in this case stems from the so-called option and lease agreement that Mr. McLane has described. The respondent's position is that substance and not mere form should be looked to in order to determine whether there was actually a lease and option or whether the entire transaction comprehended a purchase [6] and sale of the premises on February 9, 1948.

The evidence will show that there was an intent on the part of the parties to this transaction to make a sale and to make a purchase. The so-called rental payments made under this contract, this transaction, would, therefore, actually constitute the purchase price of a capital asset and not the payment in the nature of rent within the meaning of

Section 23(a) of the Code in the Internal Revenue Code, 1949.

Respondent may, during the course of this trial, use the term "lease" or "option," or "rental payments." We don't want to be held to have admitted that these are payments under a lease or an option. We will use those terms for convenience only.

We believe that the statutory notice has spelled out the issues in the case quite clearly. We believe that, upon the consideration of the statutory notice, that Mr. McLane could determine the issues.

Mr. McLane: I would like to call my first witness, Mr. D. M. Haggard.

The Court: All right, Mr. Haggard.
Whereupon,

D. M. HAGGARD

was called as a witness by and on behalf of the Petitioners and, having been first duly sworn, was examined and testified as follows: [7]

The Clerk: State your name and address, please.

The Witness: My name is D. M. Haggard, 1115 West Edgemont, Phoenix, Arizona.

The Court: Off the record.

(Discussion off the record.)

Mr. McLane: Mr. Clark and I have agreed to offer up as Petitioners' Exhibit, a certified copy of an agreement entitled "An Option," purportedly executed by John Butler and Hester Butler, dated February 9, 1948. I would like to offer that as Petitioners' Exhibit 1.

(Testimony of D. M. Haggard.)

The Clerk: Petitioners' Exhibit No. 1 admitted in evidence.

(The document above referred to was marked Petitioners' Exhibit No. 1 for identification and received in evidence.)

Mr. McLane: I would like to offer at the same time a document entitled "Lease," signed by John Butler, Hester Butler, D. M. Haggard, and Nila Haggard, dated February 9, 1948, as Petitioners' Exhibit 2.

The Clerk: Petitioners' Exhibit 2 admitted in evidence.

(The document above referred to was marked Petitioners' Exhibit No. 2 for identification and received in evidence.)

Direct Examination

Q. (By Mr. McLane): Please state your full name and address.

A. David M. Haggard, 1115 West Edgemont, Phoenix, Arizona.

Q. What is your occupation?

A. I am a farmer and a cow rancher.

Q. How long have you been engaged in farming?

A. Thirty years.

Q. Do you own a farm in Maricopa County, Arizona?

A. Yes, at Laveen, Arizona.

Q. Approximately how many acres does it consist of, Mr. Haggard?

A. 1500 acres.

Q. Did you own all of the 1500 acres at the beginning of 1948?

A. No.

(Testimony of D. M. Haggard.)

Q. How many acres did you own at that time?

A. 1340.

Q. When did you purchase the final 160 acres from Mr. Butler?

A. In the first part of the year 1950.

Q. Have you purchased any property in that area since? A. No.

Q. Had you ever leased the particular Butler 160 acres—strike that. [9]

Mr. McLane: Your Honor, when I use the term “lease,” too, I am not implying or trying to sneak words in that will have any effect at all. I just have to refer to the document some way and I would like to refer to it in that fashion.

The Court: I think we will be able to understand from the record what is intended.

Q. (By Mr. McLane): Had you ever leased this particular 160 acres prior to the purchase in 1950? A. Yes, the years 1948 and '49.

Q. Prior to executing the lease and option on February 9, 1948, did Mr. Butler ever contact you regarding the possibility of selling the 160 acres to you? A. What was the question, please?

Q. Prior to executing the lease and option of February 9, 1948, did Mr. Butler ever contact you regarding the possibility of selling the 160 acres to you? A. Yes.

Q. When was that, Mr. Haggard?

A. When did—I didn't get your question.

Q. When did he first contact you respecting the possibility of selling his 160 acres to you?

(Testimony of D. M. Haggard.)

A. Well, he came to my house early one morning, about 8 o'clock in the morning.

Q. What year? [10]

A. In the year 1948, and talked to me about the 160 acres of land.

Q. Did you tell Mr. Butler that you would buy the 160 acres at that time? A. No.

Q. What did you tell him?

A. I told him that I would lease, rent the ranch from him, that I would pay him \$10,000 for the year 1948 and that I would pay \$12,000 for the year 1949.

Q. Did you also agree to give him an option, I mean, to pay him for an option?

A. I agreed to pay him \$2,000 for an option to buy the farm in the year 1950 for a purchase price of \$24,000.

Q. Mr. Haggard, can you recall the sequence of events on the day that you and Mr. Butler reached an agreement with respect to this particular 160 acres?

A. That is the day that he come to my house in the morning.

Q. What was the outcome of the morning meeting that you just described?

A. Mr. Butler left and went to his home to talk it over with his family.

Q. Did Mr. Butler come back and see you that same day?

A. Yes, he met me in the hotel lobby of the Adams Hotel.

(Testimony of D. M. Haggard.)

Q. What was the outcome of the second meeting in the [11] lobby of the Hotel Adams?

A. Mr. Butler and his wife agreed to rent me their farm for the years '48 and '49 and to sell me the option to purchase for the year 1950.

Q. After that understanding was reached, what did you do then?

A. We went upstairs to talk to my lawyer J. D. Merrill, to draw up the papers.

Q. Did you introduce Mr. Butler to Mr. Merrill?

A. Yes.

Q. Did Mr. Merrill prepare the lease and the option to purchase which are now in evidence as Petitioners' Exhibits 1 and 2? A. Yes.

Q. Did he prepare them on the same day?

A. Yes.

Q. How long after you arrived in Mr. Merrill's office was it before the lease and option were prepared? A. One hour.

Q. Did you and the Butlers wait in Mr. Merrill's office all of the time while the papers were being prepared? A. Yes.

Q. In other words, Mr. Haggard, is it correct to say that from the time you and the Butlers got together in the lobby of the Hotel Adams, neither of the Butlers left your [12] sight until the lease and option were executed?

Mr. Clark: Objection. That question is leading.

The Court: I would imagine you would agree with that, wouldn't you?

Mr. McLane: Yes, sir, I would.

(Testimony of D. M. Haggard.)

The Court: Actually, it is a summary. I will sustain the objection.

Q. (By Mr. McLane): Did the Butlers leave your sight from the time you met them in the lobby of the Hotel Adams until the lease and option were executed? A. No.

Q. Did either Mr. Butler or his wife telephone anyone from the time you met them in the lobby of the hotel until the lease and option were executed?

A. No.

Q. Mr. Haggard, you have testified that you paid \$12,000 for the use of the 160 acres of farm land in 1949. Why were you willing to pay rent of such an amount for 160 acres of land? What were your reasons? A. In the year——

Mr. Clark: Objection.

The Court: Just a moment. What is the grounds of your objection?

Mr. Clark: The question calls for a conclusion on the part [13] of the witness.

The Court: Well, he has used the word "rent." I am not taking it literally as such. I am sure he would be just as willing to ask the witness what was in his mind with respect to the payment of the \$12,000 in 1949, but I don't really feel, Mr. Clark, that that is going to confuse the issue a great deal. There must be some choice of language and I fully recognize that the word "rent," was counsel's word and not the witness' word. I am going to overrule your objection just to make a little progress, but I

(Testimony of D. M. Haggard.)

will assure you I will give attention to that sort of thing in the testimony.

Mr. Clark: Thank you.

The Court: Go ahead. Answer the question.

The Witness: I needed the farm in the year 1949 because I wanted to lease some other adjoining lands out that I could prepare and level the ground and get the ground into hay.

The Court: What is the ground that you wanted to level and get into hay? The ground we are talking about or other ground?

The Witness: No, sir, the ground other than that of the Butler place.

The Court: Ground you already had you wanted to level off and get into hay, is that right?

The Witness: Yes, sir.

The Court: So you wanted the Butler property, you already had it in 1948? [14]

The Witness: Yes, sir.

The Court: You wanted it in 1949 for what?

The Witness: I wanted it to plant cotton on so that I could use the other land that I had to develop and get it ready for this hay crop.

The Court: What did you use it for in '48?

The Witness: In 1948, I raised a grain crop on it. I had a contract with the Capital Fuel and Feed Company to furnish them so much grain and I needed this land in order to fulfill this contract.

The Court: Go ahead.

Q. (By Mr. McLane): Mr. Haggard, did you

(Testimony of D. M. Haggard.)

consider the sum of \$10,000 in 1948 and \$12,000 in 1949 to be high rent?

The Court: Now, just a minute. I can't permit questioning in that form. If the witness rented the property, I suppose it is a question of weight rather than admissibility if he testifies as to what is the fair market value or fair rental value of it during that period, but your question so clearly suggests an answer that I wouldn't be the slightest bit interested in the answer.

Mr. McLane: Strike the question, please.

Q. (By Mr. McLane): When did you first decide to exercise the option to purchase Mr. Butler's 160 acres, Mr. Haggard? [15]

A. In the latter part of 1949.

Q. At the time that you talked with Mr. and Mrs. Butler in the lobby of the Hotel Adams on February 9, 1948, and for years prior to that time, had you ever retained a tax lawyer or an accountant for the purpose of obtaining tax advice?

A. No.

Q. Had Mr. Merrill ever given you tax advice of any kind?

A. No.

Q. Have you ever rented any other farm land for a figure of \$75.00 per acre or more?

A. I have a lease existing right now for these two years.

Mr. Clark: Objection, your Honor. It is immaterial.

Mr. McLane: Your Honor, I am trying to show

(Testimony of D. M. Haggard.)

that the payment of this amount of rent was not unusual for this petitioner.

The Court: It would be a little low, I'd say, for something, and maybe a little high for something else. The farm property that you have mentioned in your question is no foundation to indicate whether it was similar to this or close to it in point of geography or just what relationship it might have.

The question of \$75, whether somebody paid \$75 an acre for farm property would be relevant under some circumstances, but it would have to have some background to indicate any materiality to this case.

Mr. McLane: Well, I had planned to ask him where it was located and what type of land it was.

The Court: Maybe you might ask a few questions like that first.

Q. (By Mr. McLane): Mr. Haggard, have you ever rented any other farm land in the vicinity of the 160 Butler tract? A. Yes.

Q. How much acreage did you rent?

A. 145 acres.

Q. Approximately where or how far is it from your 160 acres that you acquired from Mr. Butler?

Mr. Clark: Your Honor, I am going to object on the basis that we don't know when this property was rented, whether it is now or just when.

The Court: Well, so far, Mr. Clark, it hasn't made any difference. We don't know when, we don't know whether it was comparable from the standpoint of the soil content or purpose to which it might be used or anything else, but, until we do, it

(Testimony of D. M. Haggard.)

isn't going to be harmful to you in any way anyhow. I think we will make faster progress if we permit these questions. If you want to move to strike them out later, I will consider it in view of the way in which the evidence is being developed.

Mr. Clark: Thank you, sir.

Q. (By Mr. McLane): When was this other 145 acres that you have just described rented, Mr. Haggard? [17]

A. In January of this year.

Q. Would you describe the 145 acres? Would you compare it, rather, with the 160 acres that you acquired from Mr. Butler insofar as soil content is concerned, accessibility to water?

Mr. Clark: Your Honor, may I renew my objection to that? It is too remote. He is testifying to——

The Court: Overruled. Go ahead.

Q. (By Mr. McLane): With respect to its fertility and the other factors that you consider in choosing land to farm.

A. The land is in the same locality and it is comparable in quality of the soil. The water conditions are comparable in cost. Did you ask what I paid for the ground?

Q. That question has been asked and answered before.

The Court: No, I don't think it has.

Mr. McLane: Sorry, your Honor.

The Court: I think it was attempted before but not answered.

(Testimony of D. M. Haggard.)

Q. (By Mr. McLane): What rent are you now paying for the 145 acres of land.

A. I am paying—

The Court: Now, just a minute. There is no use talking about what he is paying now. If you want to talk about what he [18] paid in '48 and '49, if he had it at that time, it may have some relationship.

Mr. McLane: I was going to try to show your Honor that I am—by comparing farm prices we could reach some inference with respect to the reasonableness of the rent at that time.

The Court: Well, if you are going to compare farm prices, then compare them and, after you get through with the comparison, if you establish that they are comparable, then ask him how much he paid.

Q. (By Mr. McLane): Mr. Haggard, are prices that you are receiving for your farm products in the year 1955 as high or higher or lower than the farm prices you received for your products during the year 1948, 1949? A. They are lower.

Q. Now, what rent are you paying for the 145 acres of land which you have just described?

A. \$70 per acre.

Q. Do you have a copy of the lease—excuse me. Strike that.

Do you have an option to purchase that particular 145 acres? A. No.

Q. Do you have a copy of the original of the lease with you at this time? [19] A. Yes.

(Testimony of D. M. Haggard.)

Q. May I see it, please?

Mr. McLane: Your Honor, I offer into evidence as Petitioner's exhibit next in order a lease executed by Garwood, Jones and Emmett Jones and D. M. Haggard, dated 20 January 1955.

Mr. Clark: May I see that, please?

Mr. McLane: Sure.

Mr. Clark: I object to the introduction of this lease. It is dated, made and entered into this 20th day of January, 1955. I think it is too remote from the period of 1948 with which we are dealing.

The Court: What have you to say, Mr. McLane?

Mr. McLane: Your Honor, I am offering it for the purpose of showing that while the amount of money paid by Mr. Haggard for the Butler 160 acres of land may appear on the surface to be rather high, that there are other instances where this particular petitioner has rented similar land for an equal amount of rent where he does not have an option to purchase, and that the amount of rent should be—should not be a factor.

The Court: Well, Mr. Clark, my feeling about the case is this: The evidence that this witness has given and the evidence that is here proposed means nothing whatever to me from the standpoint of a fair rental value of either of these properties. There is, however, in this case, a question of the element of what I might term genuineness. I don't, just as you [20] gentlemen are avoiding terms of one sort or another, I am avoiding any suggestion of good faith, bad faith or anything else. We

(Testimony of D. M. Haggard.)

are trying to determine whether this option and lease are genuine, not in the sense of whether they were genuine between this taxpayer and the other party to the deal, but whether they are genuine from the perspective of the Federal Income Tax law. I think that similar conduct on the part of this petitioner does reflect on it.

I am not attempting to suggest at this time how much weight I will give to what he is saying, but all he is saying in effect, so far as I know, is that in 1955 he paid \$70 an acre for a 140-acre tract that was yielding somewhat less than the yield which he expected back in '48 and '49 and for which he paid, I would assume that the mathematics are \$75 an acre, adding up to this \$12,000.

Now, of course, this is no time to argue the case here but any testimony of this sort has two corridors: One forward and one backward, because it also reflects on the question of why Mr. Butler would want to enter into a transaction of this kind, and why he would want to sell a piece of property for what amounts in practical effect to a two-year rental.

Now, I don't know where all this is going to lead. All I can tell you is that I think that bits of evidence of this sort may reflect on the case. I'd have to hear a great deal more before I could decide. I will reserve you the right to move to [21] strike and argue it in a brief, but I am rather inclined to hear what these witnesses have to say. You can make your objections, reserve your rights, move

(Testimony of D. M. Haggard.)

to strike and argue in the briefs and I may at that time strike it, or I may merely pay no attention to it.

On the other hand, I may give it effect, but my experience is in this type of case that unless we follow some such approach as that, we will never get anywhere. So, at this point, I will overrule your objection, reserving you the right to move to strike and to argue in briefs.

Mr. Clark: Thank you, your Honor.

Mr. McLane: May we have the Court's permission, since the lease is still in effect, to withdraw the original and substitute a photostatic copy?

The Court: Yes, you may substitute a photostatic copy.

The Clerk: Petitioner's Exhibit 3 admitted in evidence.

(The document above referred to was marked Petitioner's Exhibit No. 3 for identification and received in evidence.)

Mr. McLane: If it is agreeable with Mr. Clark, I've made a rough drawing of the property and the area around it, your Honor, if I could turn the blackboard around. Would you like to take a look here, Mr. Clark? It may help you. [22]

Q. (By Mr. McLane): Mr. Haggard, would you please look at this blackboard?

The Court: Before you go into this, off the record.

(Discussion off the record.)

The Court: On the record.

(Testimony of D. M. Haggard.)

Q. (By Mr. McLane): Mr. Haggard, will you take a look at this drawing that I have made on the blackboard of the property in the vicinity of your farm and tell the Court and tell me whether or not, although not to scale, it is an accurate drawing of the tract of land which you now farm?

A. Yes.

Q. Prior to the purchase of Mr. Butler's 160 acres, did you ever purchase any of the farm land adjoining Mr. Butler's 160 acres? A. Yes.

Q. When?

A. Well, I bought the McCallum place which is directly on the south in the year 1944.

Q. And how many acres did that consist of?

A. 400 acres.

Q. And what price did you pay for that 400 acres? A. I paid \$40,000, \$100 per acre.

Q. Did you ever purchase any other property adjoining Mr. Butler's land prior to that date?

A. Yes, in 1946, I bought the 160 acres directly on the east of the Butler 160 and I also bought 540 acres on the south and west of the Butler 160.

Q. Making a total of how many acres?

A. Making a total, I believe, it was 728 acres.

Q. What price did you pay for that 728 acres?

A. Well, it also included a grain crop and I gave \$60,000 in cash and my farm that I had at Eden, Arizona, for that 700 acres.

Q. What was your cost in the farm at Eden, Arizona?

A. Well, I might answer that by saying that

(Testimony of D. M. Haggard.)

Miller Johns sold the farm a few months after they traded from me for \$100,000.

Q. What was the agreed value of the grain crop that you purchased?

A. I paid \$20,000 for the grain crop.

Q. Is there any other property in the vicinity of the Butler 160 acres that you purchased prior to the purchase of Mr. Butler's 160?

A. Just one-half mile east of the Butler 160, I bought 320 acres in the year 1948 from Miller Johns Company.

Q. What did you pay for that 360?

A. I gave \$65,000 for it, including a beet crop that was on it.

Q. What was the agreed value of the beet crop?

A. \$20,000 we paid for the beet crop.

The Court: What does that come down to per acre for the 320 acres?

The Witness: I would figure about 140 acres.

Mr. McLane: I was going to compute the mathematics in brief, your Honor.

The Court: All right, but it is a little bit difficult to follow at this point. I thought the witness could tell me that.

Q. (By Mr. McLane): With respect to the 160 acres directly to the east of Mr. Butler's 160, at the time of purchase of the 160 acres directly to the east of Mr. Butler's 160, was there any difference in the quality or condition of that 160 acres compared with Mr. Butler's 160 acres?

A. Yes.

(Testimony of D. M. Haggard.)

Q. What was that difference?

A. Well, this Miller Johns land had been leveled to grade and it was in condition whereby they had spent \$75 in putting the land in preparation and leveling it, which did not exist on the Butler property.

Q. Was the Butler property leveled when you acquired it? A. No.

Q. Did you subsequently level it? [25]

A. Well, after I bought it in the year 1950, I leveled it.

Q. What did you pay to level it, per acre, in 1950? A. \$75 per acre.

Mr. McLane: May I have marked as Petitioner's Exhibit next in order—I just have two or three exhibits, your Honor, and I am finished, a check dated January 1st, 1949, in the sum of \$12,000, signed by D. M. Haggard, made payable to John Butler and Hester Butler. May I have that marked for identification, please?

The Clerk: Petitioner's Exhibit 4 marked for identification.

(The document above referred to was marked Petitioner's Exhibit No. 4 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you——

Mr. Clark: Are you going to introduce the '48 payment also?

Mr. McLane: I have a check for \$10,000.

Q. (By Mr. McLane): Mr. Haggard, I hand

(Testimony of D. M. Haggard.)

you Petitioner's Exhibit marked for identification as——

The Clerk: Four. [26]

Q. (By Mr. McLane continuing): ——4, and ask you that you examine it and identify it, if you can.

A. This is a check I gave to Mr. and Mrs. Butler for rent in the year 1949.

Mr. McLane: Your Honor, I offer Petitioner's Exhibit marked for identification as Petitioner's Exhibit No. 4 into evidence.

The Court: Very well.

The Clerk: Petitioner's Exhibit No. 4 admitted in evidence.

(The document above referred to, heretofore marked as Petitioner's Exhibit No. 4 for identification was received in evidence.)

Mr. McLane: May I have marked for identification as Petitioner's Exhibit 5 an agreement entitled, "Subordination Agreement," dated 1 April 1949, signed by D. M. Haggard and Nila Haggard.

The Clerk: Exhibit 5 marked for identification.

(The document above referred to was marked Petitioner's Exhibit No. 5 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you Petitioner's Exhibit 5 marked for identification—— [27]

Mr. Clark: May we have a chance to look this over?

(Testimony of D. M. Haggard.)

Mr. McLane: Certainly.

Mr. Clark: I have no objection to this.

The Court: Very well.

Mr. McLane: I just asked Mr. Haggard to examine it for a moment. Then I'll offer it in evidence.

I offer Petitioner's Exhibit marked for identification as 5, as Petitioner's Exhibit 5 in evidence.

The Clerk: Petitioner's Exhibit 5 admitted in evidence.

(The document above referred to heretofore marked as Petitioner's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. McLane): Mr. Haggard, would you tell the Court and tell me why this subordination agreement was executed?

Mr. Clark: Objection, your Honor, it is a leading question, calls for a conclusion on the part of the witness.

The Court: Well, I don't think it is leading; as to whether it calls for a conclusion, it seems so far as I can conclude, it calls for a factual answer. If the witness answers otherwise, you can move to strike. I will overrule your objection at this point.

The Witness: Well, in the year 1949, Mr. Butler wanted to mortgage this farm to the bank and borrow some money and the [28] bank, of course, in searching the records, found that I had an option to purchase the farm and they just asked

(Testimony of D. M. Haggard.)

me that if I did purchase the farm if I would assume the loan that Mr. Butler was taking out against it.

Q. (By Mr. McLane): Mr. Haggard, was the transfer of title of Mr. Butler's 160 acres to you handled by an escrow agent in Phoenix?

A. Yes.

Q. Which one?

A. Phoenix Title and Trust.

Q. At what time did that escrow agent deliver to you or your attorney a deed to the property?

A. Sometime in the first part of the year of 1950.

Mr. McLane: May I have marked as Petitioner's Exhibit next in order a document entitled, "Warranty Deed Executed by John Butler and Hester Butler"?

The Clerk: Petitioner's Exhibit 6 marked for identification.

(The document above referred to was marked as Petitioner's Exhibit No. 6 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you Petitioner's Exhibit marked for identification as 6, and ask that you examine it and identify it, if you will. [29]

A. Well, this is a deed that was given from Mr. and Mrs. Butler to me and my wife for the 160 acres in question.

Mr. McLane: I offer as Petitioner's Exhibit

(Testimony of D. M. Haggard.)

next in order, Exhibit 6, which has been marked for identification.

Mr. Clark: No objection.

The Clerk: Petitioner's Exhibit 6 admitted in evidence.

(The document above referred to heretofore marked Petitioner's Exhibit No. 6 for identification, was received in evidence.)

Mr. McLane: May I have marked for identification as Petitioner's Exhibit 7, a check signed by D. M. Haggard, dated 1950, in the sum of \$12,-619.35, made payable to the Phoenix Title and Trust Company?

The Court: How many more items of that sort do you have?

Mr. McLane: That is all, your Honor.

The Court: Certainly items of this type might well have been stipulated beforehand.

The Clerk: Exhibit 7 marked for identification.

(The document above referred to was marked as Petitioner's Exhibit No. 7 for identification.)

Q. (By Mr. McLane): Mr. Haggard, I hand you Petitioner's Exhibit marked for identification as 7, and ask that you examine it and [30] identify it, if you will?

A. It is a check I gave to the Phoenix Title and Trust Company to pay Mr. Butler for the balance over and above the amount he owed the bank on the place.

(Testimony of D. M. Haggard.)

Mr. McLane: I offer this as Petitioner's Exhibit next in order.

Mr. Clark: No objection. I do feel, though, if some of the checks go in, they should all go in.

Mr. McLane: I have the checks here for '48, if you want to offer them, Mr. Clark. You are welcome to them.

The Clerk: Petitioner's Exhibit 7 admitted in evidence.

(The document above referred to heretofore marked Petitioner's Exhibit No. 7 for identification, was received in evidence.)

Mr. McLane: That is all.

Mr. Clark: Mr. McLane, have you completed your direct examination?

Mr. McLane: Yes.

Cross Examination

Q. (By Mr. Clark): Mr. Haggard, were you familiar with the fact that this property had been offered for sale prior to your deal with Mr. Butler?

A. Yes. [31]

Mr. McLane: The record doesn't show that the property had been offered for sale, your Honor. Objection on that ground.

The Court: Well, the witness evidently understood the question. It is cross examination; leave it in.

Q. (By Mr. Clark): Would you repeat your answer to that, please? A. Yes.

(Testimony of D. M. Haggard.)

Q. You were.

Did you know what price Mr. Butler was asking for this property?

A. No, only by rumor.

Q. Only by rumor. What was the amount of the rumor?

A. Well, I tried to buy the place the year before for \$100, and the year after that for \$150.

The Court: 100, 150 what?

The Witness: Dollars per acre.

Mr. Clark: I would like to have that answer stricken as not responsive to the question.

Q. (By Mr. Clark): Do you recall—what was your understanding that the property was being offered for?

A. I couldn't answer that definitely, because it had been rumored at 100, 150 and up to \$200 an acre.

Q. You testified on direct examination that [32] you had first talked to Mr. Butler directly concerning this deal at your house in the morning. Isn't it a fact that your first conference with him was at the Hotel Adams?

A. No. Well, he was a neighbor. I may have talked to him at the Hotel Adams.

Q. On the day that the transaction took place?

A. No, no. The first thing, he come to my house early in the morning, at 8 o'clock in the morning, and talked to me about the 160 acres of land.

Q. Who is Dan Merrill?

A. That is Daunt, D-a-u-n-t, Merrill.

(Testimony of D. M. Haggard.)

Q. I am sorry.

A. He was my attorney.

Q. He was your attorney. What time of the day was it that you got to Mr. Merrill's office?

A. I'd say about 10 or 11 o'clock in the morning.

Q. Who was present?

A. Mr. Merrill, Mrs. Butler, Mr. Butler, and myself.

Q. Directing your attention to these instruments that were executed on that day, who was required to pay the taxes and assessments on this 160 acres during the time that you were holding the property?

A. You mean during the time of the lease?

Q. I mean from 1948.

A. Well, it is stipulated in the lease that [33] I should pay the taxes in addition to the rent.

Q. And did you actually make those payments?

A. The tax payments?

Q. Yes. A. Yes.

Q. Were there any buildings on that property?

A. There is a shack.

Q. There was a building on the property?

A. Just a little labor shack, yes.

Q. Now, isn't it a fact that there was insurance, there was insurance on this building at the time that you took over in 1948?

A. I don't know.

Q. Did you carry insurance on that subsequently?

(Testimony of D. M. Haggard.)

A. No. Mr. Butler may have insured the shack when he borrowed the money in 1949. That I can't tell you, from the bank.

Q. Mr. Haggard, you testified that this 160 acres was not leveled at the time you took over the land in 1948? A. Yes.

Q. Is that true? Just when was it that you leveled that property?

A. It was in the spring of 1950.

Q. You are sure of that? A. Yes. [34]

Q. Did you put any fences around this property? A. You mean after 1950 or before?

Q. I mean after 1948?

A. Not until 1950.

Q. Not until 1950. What crops did you plant on this property in 1948?

A. It was planted to barley.

Q. Did you plant anything else in 1948?

A. No.

Q. Only barley?

A. Well, I had two crops of grain, barley in the early part of the season and hygeria in the latter part of the season. I raised two crops on it.

Q. And you pastured part of the land?

A. No, not in 1948.

Q. Did you do so in 1949?

A. No. Well, I might say that I run some cattle on that portion that I didn't have water for. I didn't have it all in crops in '49. I had 90 acres in crops and the rest was left out.

Q. Didn't you have some alfalfa planted?

(Testimony of D. M. Haggard.)

A. No.

Q. Neither '48 nor '49? A. No.

Q. Are you familiar with the soil content [35] of that portion of the property that you testified that you paid 100 per acre for?

A. Am I familiar with it?

Q. Yes. A. Well, I think so.

Q. Isn't it a fact that that soil had a large alkali content?

A. I'd say no more than the surrounding, no more than the Butler place nor the Miller Johns place that joined it.

Q. What was the level of that land in comparison with the other 160 acres?

A. What do you mean by the level of the ground?

Q. In other words, which of it is higher land, looking at the topography of it?

A. It is equal, I'd say.

Q. It is approximately the same level all the way across?

A. I might say that the Butler land is between the river and the McCallum place, but the ground is quite level. I don't mean that it is level from an operating standpoint, but it is level from the slope of the country standpoint.

Q. Now, isn't it a fact that land values generally in the area have increased considerably since 1948? In other words, the price of the land itself?

A. Well, let me answer you this way: The [36]

(Testimony of D. M. Haggard.)

revenue off of the land is less than it was in '48 and '49.

Q. That is not being responsive to the question.

A. In this particular area, I'd say no.

Q. In this particular area, you would say that the land, the price per acre of the land that you would pay——

A. Is not materially——

Q. ——would be less than it was in '48?

A. I didn't say less; I said it hadn't materially increased.

Q. Would you explain the word "materially increased"?

A. Well, I mean that if it is worth \$150 an acre in 1948, it is still worth comparatively that same price. Does that answer your question?

Q. I think it does.

A. I might add, plus the improvements, that's been put on the property. I mean the ground, I spent \$75 an acre levelling it. It's been fenced and improved since that time.

Q. Mr. Haggard, don't you feel——

Mr. McLane: Object to the form of the question, your Honor. I don't think that what he feels is particularly relevant.

The Court: Well, probably not, but let's see what the substance is.

Mr. Clark: I will rephrase the question.

I am not going to ask the question, and no [37] further questions.

The Court: I'd like to ask this witness a few

(Testimony of D. M. Haggard.)

questions. Counsel understand they have just as much right to object to my questions as to those of each other. Mr. Haggard, as I gather it, you knew that this property was for sale prior to the time you entered into this lease and option and that you tried to buy it for \$100, \$150 an acre previously?

The Witness: Yes.

The Court: When it came down to the day on which you and the Butlers decided and went ahead with it, who approached whom?

The Witness: Mr. Butler came to my house, as I stated, early in the morning.

The Court: And Mr. Butler knew you were interested in purchasing it?

The Witness: Well, I'd say he come to try to sell it to me.

The Court: Who mentioned the amounts of the lease, the option and purchase price?

The Witness: Well, I told Mr. Butler that I didn't want to buy the place but that I would rent it because I needed it for the next couple of years for a program that I had outlined, and that I would take an option on it so that if the land, after it showed me what it would do, I might want to buy it. For that reason, I paid for the option [38] for the opportunity to buy it.

The Court: Well, you contemplated using it two years, didn't you?

The Witness: Yes.

The Court: Well, why were you willing to pay

(Testimony of D. M. Haggard.)

on a basis of about \$150 an acre for two years for land which you could have bought outright for \$150 an acre?

The Witness: Well, I needed the land for these particular two years.

The Court: You could have bought it, couldn't you?

The Witness: Well, he didn't offer me this for \$150 an acre. I probably would have bought it, but I don't know that I would.

The Court: Mr. Haggard, before you got through talking either to him or to your counsel, you knew you could buy it for \$150 an acre, couldn't you?

The Witness: If I wanted to exercise the option in the year 1950.

The Court: Mr. Butler isn't going to give you an option to sell at \$150 an acre unless he is willing to sell, is he?

The Witness: That is right.

The Court: So you knew at that time you could buy it for \$150 an acre?

The Witness: Yes.

The Court: And you knew that Mr. Butler [39] wanted to sell then, you were the one that wanted to lease, so you say.

The Witness: Yes.

The Court: What advantage was it to you, if any, to pay \$150 an acre for the two years use of a piece of property that you could have bought for \$150 an acre?

(Testimony of D. M. Haggard.)

The Witness: Well, I might not want it again in two years.

The Court: Well, let's assume you didn't want it. You still would have paid \$150 an acre for using it. You could have abandoned it as far as that is concerned.

The Witness: Well, I ask you to bear in mind that in the year 1948 that I had one of those real good grain contracts. It is a matter of record I had grain sold for \$3 a hundred, \$80 a ton, and I needed the land to produce the grain to fill this contract with. That was for the year 1948.

The Court: Well, it would have produced the grain just as well if you had bought it as if you had leased it, wouldn't it?

The Witness: Well, your Honor, it takes \$24,000 to buy a piece of land if you pay cash for it.

The Court: Well, it took \$12,000 to get a lease and an option, didn't it?

The Witness: That is only half of \$24,000.

The Court: Well, your arithmetic is certainly correct but you knew you were also obligating [40] yourself for another \$12,000 in one year, didn't you?

The Witness: Yes, but I had twelve months to make the money to pay the next lease in.

The Court: You had considerable property at that time, didn't you, Mr. Haggard?

The Witness: Your Honor, sometimes property isn't money.

The Court: Now, answer my question. You had

(Testimony of D. M. Haggard.)

considerable property, didn't you?

The Witness: Yes.

The Court: Had you ever dealt with a bank to borrow money?

The Witness: Yes.

The Court: You ever have any difficulty borrowing \$24,000?

The Witness: Yes.

The Court: When?

The Witness: Well, in my lifetime, many times.

The Court: Well, is it or not a fact that you could have borrowed \$24,000 on the property that you had plus the Butler property in 1948 at a rate of interest which would have been less than \$22,000 for a year and ten months?

The Witness: Your Honor, I owed \$100,000 on the other properties already. It was pretty well mortgaged.

The Court: When you ultimately bought the property in 1950, did you pay cash for the difference between the mortgage and the purchase price or did you borrow it? [41]

The Witness: I paid cash for part of it. I assumed the note against it.

The Court: Well, I understood that you assumed the balance that Butler owed the bank to which you had subordinated your option.

The Witness: That is correct.

The Court: But you produced a check here for \$12,000 and some odd dollars.

The Witness: Yes, sir.

(Testimony of D. M. Haggard.)

The Court: Was that available cash or was it borrowed?

The Witness: It was available cash. I had two pretty good years in '48 and '49, if you remember.

The Court: Mr. Haggard, would you have entered into this lease if you hadn't gotten an option with it?

The Witness: An option to buy?

The Court: Yes.

The Witness: I may have. I might not. I couldn't answer that truthfully. I think I would because I needed that land particularly for those two years.

The Court: All right. Anything further, gentlemen?

Mr. McLane: May I ask——

The Court: Well, I think it is your turn, Mr. McLane.

Redirect Examination

Q. (By Mr. McLane): Mr. Haggard, did [42] you know when you entered into this agreement with—strike that.

When you entered into this agreement with Mr. Butler to use his land for two years, you knew, did you not, that the sums that you were going to pay him were deductible as rent on your income tax return, or, at least, did you assume that?

A. Yes.

Mr. McLane: That is all.

The Court: Is that all, Mr. McLane?

(Testimony of D. M. Haggard.)

Mr. McLane: Yes, sir, that is all.

The Court: Yes?

Mr. Clark: Would you mark this 1948 income tax return Respondent's Exhibit A?

The Clerk: Respondent's Exhibit A marked for identification.

(The document above referred to was marked Respondent's Exhibit A for identification.)

Mr. Clark: Would you mark this 1949 income tax return as Respondent's Exhibit B for identification?

The Clerk: Respondent's Exhibit B marked for identification.

(The document above referred to was marked Respondent's Exhibit B for identification.)

Mr. Clark: Would you like to see this?

Mr. McLane: Just the '48.

Recross Examination

Q. (By Mr. Clark): Mr. Haggard, I hand you a document marked for identification as Respondent's Exhibit B. Can you identify those documents?

A. That is my income tax return for '49.

Q. Is that your signature at the base of it?

A. Yes.

Mr. Clark: Your Honor, the Respondent submits the 1949 income tax return, marked Exhibit B, and requests it be admitted in evidence.

The Court: Very well.

(Testimony of D. M. Haggard.)

The Clerk: Respondent's Exhibit B admitted in evidence.

(The document above referred to heretofore marked Respondent's Exhibit B for identification was received in evidence.)

The Court: I'd like to see that, Mr. Casey.

Q. (By Mr. Clark): Mr. Haggard, I hand you Respondent's Exhibit B for identification—correction: Make that Respondent's Exhibit A for identification.

Can you identify this document? [44]

A. It looks like my tax return for 1948.

Q. Thank you, sir.

Mr. Clark: We submit Respondent's Exhibit A and request that it be admitted in evidence.

Mr. McLane: Would it be out of order to ask for what purpose it is being submitted, your Honor?

The Court: No, I think you have a right to ask.

Mr. Clark: We are submitting this, your Honor, because the Petitioner has entered in \$12,000 as deductions for 1948, claiming it as rent, whereby he has testified that he has paid \$10,000 in rent for 1948. We wish to show that the Petitioner considered the entire \$12,000 as part of the deal.

Mr. McLane: I am not clear what you mean "part of the deal," Mr. Clark.

Mr. Clark: Part of the payment for that year.

Mr. McLane: Part of the payment of what, rent? .

(Testimony of D. M. Haggard.)

The Court: Mr. McLane, whether it proves what Mr. Clark says or not may be a different matter, but I do think it is relevant.

Mr. McLane: No objection then, your Honor.

The Clerk: Respondent's Exhibit A admitted in evidence.

(The document above referred to heretofore marked as Respondent's Exhibit A for identification was received in evidence.)

The Court: I'd like to see that, too.

Mr. Clark: Certainly, sir.

Q. (By Mr. Clark): Mr. Haggard, was the payment made in 1948 of \$2,000 and of \$10,000 made from ready cash? In other words, did you have that money on hand?

A. I really don't remember. I believe I did, but I'm not sure. I may have borrowed it, some of it.

Q. Could you recall if you would have had to borrow the money to make a payment?

A. Well, let me put it like this: If I didn't borrow money for that, I probably borrowed it for making my crops or something else. You see, when a rancher borrows money to operate on, he might use it for various purposes. I borrowed money in 1948.

Q. Would you recall whether you borrowed money for this purpose?

The Court: He said he probably didn't, that he probably paid it in cash, but he wasn't sure.

Mr. Clark: Thank you.

Q. (By Mr. Clark): Mr. Haggard, I show you

(Testimony of D. M. Haggard.)

Respondent's Exhibit A, under the income tax schedules, and an item of rent paid to John Butler, trustee, Phoenix, Arizona, in the amount of \$12,-243. Now, did you pay over \$12,243 in that [46] year under this instrument that is entitled "lease"?

A. I don't believe I understand your question.

Q. I will rephrase the question. I am sorry. Does this figure of \$12,243 reflect in there the \$2,000 that you paid pursuant to the instrument entitled "Option"?

A. Well, that's probably an error in bookkeeping because \$2,000 was for an option. The \$10,000 was for rent.

Q. But you did not pay that much money under the instrument entitled "Lease" during 1948?

A. Well, to Mr. Butler, I think the check was exactly \$10,000 for rent.

Mr. Clark: Thank you. No further questions.

Would you mark these Respondent's Exhibits B and C for identification, or C and D; I am sorry.

The Clerk: Respondent's Exhibits C and D marked for identification.

(The documents above referred to were marked for identification as Respondent's Exhibits C and D.)

Q. (By Mr. Clark): Mr. Haggard, can you identify these?

Mr. McLane: I have no objection to them going into evidence, Mr. Clark, if you are just identifying for that purpose.

Mr. Clark: Thank you. [47]

(Testimony of D. M. Haggard.)

The Court: They will be received in evidence.

The Clerk: C and D in evidence.

(The documents above referred to heretofore marked Respondent's Exhibits C and D for identification were received in evidence.)

The Court: Do you have any further questions?

Mr. McLane: No, sir.

The Court: I think it is a convenient time to recess until 25 minutes of 12.

(Short recess.)

Mr. McLane: Call Mr. John Butler.

Whereupon,

JOHN BUTLER

a witness called by and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: John Butler, 120 West Adams Road, Phoenix, Arizona.

Mr. Clark: Mr. Butler, would you speak a little bit louder, please. It is awfully difficult to hear.

Direct Examination

Q. (By Mr. McLane): Mr. Butler, have you been subpoenaed to appear in [48] this proceeding?

A. Yes, sir.

Q. By the Respondent? A. Yes, sir.

Q. Do you recall the sequence of events which

(Testimony of John Butler.)

occurred, Mr. Butler, on the day that you and Mr. Haggard executed a document entitled "Lease" and a document entitled "Option to Purchase"?

A. Yes, sir.

Q. In Phoenix? A. Yes, sir.

Q. On that day, did you meet Mr. Haggard in any hotel in Phoenix? A. Yes, sir.

Q. Which hotel?

A. In the Adams.

Q. Approximately what time?

A. Oh, I'd say around 9 o'clock in the morning, somewhere around that time of the morning.

Q. After you met him in the lobby of the Hotel Adams, at that time, where did you go from there?

Mr. Clark: Objection, your Honor. It hasn't been established that he met him in the lobby of the hotel.

The Court: Well, he said in the hotel. Where in the hotel did you meet him? [49]

The Witness: I believe it was in the coffee shop.

The Court: All right. Where did you go from the coffee shop?

The Witness: We went up to this lawyer's office.

Q. (By Mr. McLane): Do you recall what his name was, Mr. Butler?

A. His name, according to his lease and everything, was J. D. Merrill.

Q. Was he your attorney?

A. No, sir, I never seen him before.

(Testimony of John Butler.)

A. After you met Mr. Haggard, in the coffee shop of the Hotel Adams—strike that.

From the time you met Mr. Haggard in the coffee shop of the Hotel Adams until the time the lease, excuse me, the document entitled “lease” and the document entitled “Option” were executed in Mr. Merrill’s office, did you consult with any lawyer, tax accountant, or tax attorney?

A. I went back to Mr. Merrill’s office during the noon hour and consulted him about it and he tried to explain to me and he called up some tax man, I don’t know who he was, I don’t remember the name, but he talked to him over the phone and he turned around to me and said I’d just go ahead and report it as a sale, so that’s what I did.

Q. When was the first time you discussed the transaction after you executed the papers in [50] Mr. Merrill’s office?

A. That date.

Q. Well, when after that did you, then?

A. Well, I went back up there during the noon hour, see, and talked to Mr. Merrill and that is what he convinced me was right. In other words, I could do.

Q. That was after you signed the papers or before?

A. No, no, sir, before, during the noon hour, and then I went home and met my wife and we signed the papers and that was it.

Q. When was the time that you discussed the

(Testimony of John Butler.)

transaction with anyone after that particular occasion?

A. I think about a week, I took it up to another lawyer and let him look it over just to see if it was bona fide, in other words, you know. I am pretty dumb myself and I gave this lawyer \$10 to look it over and he said it was all right and he did point out a paragraph in there he would have done a little different, one way or the other, I don't remember what it was.

Q. At that time, did you have an accounting firm preparing your income tax return?

A. Not at that time, I didn't no. I had a lady who had been keeping my books, but she had moved after that calendar year. They had moved down to Missouri, and the next year I moved up to Treadways.

Q. Who is that, now, Mr. Butler? [51]

A. You mean before?

Q. Who is Treadways?

A. Treadway and Associates. They are public, C.P.A., accountant firm in Phoenix.

Q. Did they prepare your '48 Federal income tax return?

A. They prepared the first one in '49, I think. They prepared the first one, I think that year.

Q. Did they prepare the return?

A. Earl Brown prepared my return from the year back, which would be '48, was in January '49, I am pretty sure.

Q. Was it the suggestion of Treadway and As-

(Testimony of John Butler.)

sociates that they report the full amount of the gain of the transaction for the year 1948?

A. Well, I don't remember what was said and all, but Harold just says, "Well, just go ahead and report it as sales; that is what it looks like to me," which he did, and that's all.

Q. Did you realize a loss in 1948 which had the effect of offsetting any gain reported from the Haggard transaction? A. I don't know.

Q. Do you have your return for that year with you?

A. No, sir, I don't have either one of them.

Q. Did you ever tell an Internal Revenue agent by the name of Mr. Ritchie that you wanted to pay some \$800 or \$900 in tax and treat the Haggard payment as rent? [52]

A. We wrangled, I think. It is years ago, last summer, and I think '48, in other words, I don't think I would have had to pay any tax. I didn't pay—I don't think, then, right along there, and I asked my bookkeeper, I says, "How much would it cost me to pay that '49?" See? And he told me about \$900, and I told him, "Let's pay it," and I went away and never seen him for a couple of weeks and, finally, maybe quite a little while after, then he came out to my place to pick up a couple of watermelon and he says, "We won that case. It is all settled." And that is the way I left it. I told him if that is what it takes, I'll pay it.

Q. In other words, that offer was refused?

A. Well, I don't know whatever happened to it,

(Testimony of John Butler.)

but, anyway, they told me it was all cleared.

Mr. McLane: Mr. Clark, is there going to be any objection to the mortgage and the extension and modification agreements?

Mr. Clark: No, I don't believe there will be any objection to that.

Mr. McLane: All right. May I offer as Petitioner's Exhibits next in order, first, a mortgage, dated 1 April 1949, executed by John Butler and Hester Butler, in favor of the Valley National Bank of Phoenix, Arizona?

The Clerk: Petitioner's Exhibit No. 8 admitted in evidence. [53]

(The document above referred to was marked Petitioner's Exhibit No. 8 for identification and received in evidence.)

Mr. McLane: I offer into evidence as Petitioner's Exhibit next in order a document entitled "Extension and Modification Agreement, "dated April 1, 1949, between John Butler and Hester Butler and the Valley National Bank of Phoenix, Arizona.

The Clerk: Petitioner's Exhibit No. 9 admitted in evidence.

(The document above referred to was marked Petitioner's Exhibit No. 9 for identification and received in evidence.)

Q. (By Mr. McLane): Mr. Butler, did you have any heart trouble in 1947?

A. I had a little condition there, went to the

(Testimony of John Butler.)

doctor about six months, wasn't very serious, I don't think.

Q. Did you borrow any money on this 160 acres that was transferred to Mr. Haggard? Did you borrow any money during 1949?

A. 1949, we got an equitable life insurance policy, I mean a loan of \$12,000. There was about, I think, around \$6500 Federal loan *again it* at the time, see. Of course, that was paid off. [54]

Q. Did you receive the proceeds of that loan?

A. Yes, yes.

Mr. McLane: That is all, your Honor.

Cross Examination

Q. (By Mr. Clark): Mr. Butler, directing your attention to your meeting with Mr. Haggard in the coffee shop of the Hotel Adams, can you recall any conversations that you had with him at that time?

A. Well, I don't. It's been a long time, but I remember we figured, talked around there, and he said, "Let's go upstairs; see what we can figure out." He said, "We will just try to make a deal with you," something like that.

Q. At the time, did you discuss with him a price for this property? A. Yes.

Q. Just what did you say to him so far as you can recall?

A. Well, \$48,000 was what I was selling—he asked me what I was selling it for and I told him \$48,000.

Q. And what was his reply to you?

(Testimony of John Butler.)

A. Well, I don't remember because we went upstairs to his lawyer and discussed it there and he started to work on it as well as I can remember.

Q. Was there any discussion as to the [55] matter of taxes at that time? A. No.

Q. There was not?

A. Not as I know of.

Q. Did Mr. Haggard agree to purchase this property from you there in the coffee shop?

Mr. McLane: Objection to the question, the form of it, your Honor. He asked whether purchase——

Mr. Clark: I asked whether a purchase price was mentioned in that conversation.

The Witness: Well, I——

The Court: I think the question is a little bit misleading, Mr. Clark. It is true it is on cross examination—you can have a little bit more latitude—but this witness has been a rather frank witness, apparently also doesn't know very much about these things. I think you can ask him in a way which doesn't assume such things as a purchase. All he said was that the purchase price, so far as he was concerned, if there had been a sale, was \$48,000. Now, you can go into that as much as you want, but I think it is a little unfair to try to put into his mouth as to whether he would agree to a sale or not. Let him testify to it, rather than to suggest it.

Q. (By Mr. Clark): After you left the coffee shop, Mr. Butler, where did you go? [56]

(Testimony of John Butler.)

A. We went up to this lawyer's office.

Q. Up to the lawyer's office?

A. Yes, sir.

Q. Who was present in the lawyer's office at that time?

A. Oh, this lawyer and Mr. Haggard and myself is the only ones I can recall. There might have been a girl in there but I don't remember, could have been, I mean a stenographer.

Q. Was Mrs. Butler present at that time?

A. No.

Q. And you testified that you left the office and then returned, is that correct?

A. Yes, sir. In other words, it kind of bothered me. I didn't know how it was going to affect my income tax and then I went back up there to get a little information on it and he convinced me, in other words, it was more or less all right, so I went ahead and went on home and got my wife and we come back and signed it, and then next year we reported it as a sale, as a sale in other words.

Q. Did you question the form of the documents?

A. No sir, I didn't because I am not a lawyer and, in other words, I just took the man's word for it.

Q. But after you had executed these instruments, you say then you went and discussed the matter with your attorney?

A. About a week later.

Q. About a week later? [57]

(Testimony of John Butler.)

A. I think it was. I know my father was sick at the time. He died the next two, three days, and, afterwards, I took it over to another lawyer I knew and let him look it over just to see it was all right, in other words. I thought it was, but, just to satisfy myself, it was legal in every way.

Q. Now, you testified, further, that at the end of the year when your income tax return was being prepared that you treated this matter as a sale, is that correct?

A. I didn't catch—you mean——

Q. I will rephrase the question. Did you treat this transaction as a sale on your 1948 income tax return?

A. Well, yes, they filed it as a sale, in other words.

Q. How did you report it?

A. Well, I don't know. The tax men fixed it up. I don't know.

Q. Was there and \$8,000 gain that you reported on your return?

A. Well, yes, if there were.

Q. There was. A. I suppose.

Q. In other words, you based this on the basis——

A. Of \$8,000 gain.

Q. And that \$8,000 gain would be computed how?

A. Well, you show half your profit, don't you?

Q. That is true. [58]

A. We had \$2200, well, went in again that prop-

(Testimony of John Butler.)

erty. I don't know how that was figured in. I Don't know how they figured it up.

The Court: You mean \$2200 or \$22,000?

The Witness: \$2200.

Q. (By Mr. Clark): When did you purchase this property? A. In 1945, in November.

Q. And what did you pay for it at that time?

A. \$40,000.

Q. \$40,000? A. Yes, sir.

Q. Therefore, you treated this as a sale with a sale price of \$48,000 and reported an \$8,000 gain, is that correct? A. I think so.

Q. That was 50 percent taxable, is that correct?

A. You have to pay on half your profit.

Q. That is right. Mr. Butler, what use did you make of this land from the time that you bought it in 1945 until you turned over possession of it to Mr. Haggard in 1948?

The Court: What difference does it make, Mr. Clark? Why do we go into that?

Mr. Clark: Well, your Honor, we wanted to show the rental in comparison values.

The Court: Is there going to be any testimony as to rental values? [59]

Mr. Clark: Yes, sir.

The Court: All right. Go ahead.

Q. (By Mr. Clark): What use did you make of this property from 1945 until you turned it over to Mr. Haggard in 1948?

A. We farmed it in 1947 ourselves and, in 1948,

(Testimony of John Butler.)

I leased my cotton ground all to a fellow named Bunde Strom.

Q. Would you repeat that, please? What year did you farm it yourself? A. '47.

Q. '47. A. '46.

Q. Thank you.

A. '47 had it leased to Strom.

Q. And what type of crops did you plant on it in that year?

A. When I farmed it, I had 80 acres of barley and then planted it in hygeria and then had the other 80 acres in alfalfa, was in alfalfa when I bought it.

Q. Approximately what per acre profit did you make off the land in '46?

A. Oh, I made approximately \$25, \$30 an acre, probably.

Q. You say you rented this property to Mr. Bunde Strom? A. Yes, sir. [60]

Q. In 1947? A. '47.

Q. And what rental did Mr. Strom pay you for the property? A. \$4,000.

Q. Which would amount to?

A. \$25 per acre.

Q. How long have you known Mr. Strom?

A. Oh, since about 1934, '35, somewhere around there.

Q. Do you know what his occupation has been since you have known him? A. Farmer.

Q. He has been a farmer all the time?

A. Yes, sir.

(Testimony of John Butler.)

Q. Did you feel that Mr. Strom—

Mr. McLane: Object to the form of the question, your Honor. If he wants to ask him a question as to fact—he says, “Do you feel”.

The Court: Objection sustained.

Q. (By Mr. Clark): Has Mr. Strom rented or sold other property that you know of in the neighborhood?

Mr. McLane: Your Honor, I must object to that as pure hearsay. The man that has the information is not in Court to be cross-examined. [61]

The Court: What is it directed to, Mr. Clark?

Mr. Clark: I want to show that Strom knew what he was doing, that he was cognizant of land values and rental values.

Mr. McLane: They could have subpoenaed him as a witness, your Honor.

The Court: This witness' assessment of whether Mr. Strom knew what he was doing wouldn't make any impression on me. The concrete facts are that, for one year immediately prior to this transaction, the property brought \$25 an acre.

Mr. Clark: Yes, sir.

The Court: Just what more you want than that is a little difficult for me to see.

You are not trying to prove that Mr. Strom paid more than it was worth, are you?

Mr. Clark: No.

Q. (By Mr. Clark): Mr. Butler, when did you decide that you wanted to dispose of this property?

(Testimony of John Butler.)

A. Oh, about, I'd say, a month before I made a deal with Haggard.

Q. How did you go about offering this property for sale to the general public?

A. Well, I had it listed there for a couple weeks with Griffin Bennett, I believe it was, in Phoenix, a real estate firm, with a fellow named Donald George who was a salesman, in [62] other words. He came out looking for listings and I gave him listings on that.

Q. What was the price that you were demanding for this property?

A. I had it listed at \$48,000.

Q. At \$48,000? A. Yes, sir.

Q. Was Griffin Bennett the name of the outfit?

A. I believe it was.

Q. Did they produce for you any prospects?

A. I would say they had at least half a dozen prospects but one fellow had a mortgage on an apartment house, he wanted to trade in a first mortgage on an apartment house. Another fellow had 20 acres he wanted to trade in, another had a Ford he wanted to trade in. What I wanted to do was dispose of it, get rid of it. Every two, three days, would call me up—if you are in town, come around, we got a fellow to talk you over. What I was trying to get, the thing, get the money out of it, get it cleaned up as quick as I could.

Q. Did anyone offer to buy this property from you?

A. Fellow named Talby and his brother-in-law.

(Testimony of John Butler.)

Q. When was that offer made?

A. Oh, they was there about a week before this and they came back two or three times and their father called me up and told me that he would sign the paper and guarantee the payments [63] and everything. One of these boys just come back from service a couple years before, both of them was, so far as that was concerned, and \$8,000 he wanted to pay down, according to that, what do you call it there? Says five, but I think it was eight. I thought it was eight at that time. Then the balance of ten equal payments, in other words.

Q. In other words, ten equal payments?

A. He was going to sign the paper to guarantee it and he was worth it.

Q. How long had you known the Talbys?

A. Ever since about 1930. They bought my father's old ranch out there. They were vegetable growers up to the end of the war. Then one of the brothers died and the other one had this son and son-in-law. When they came back, why, he turned everything over to them.

Q. What caused you to contact Mr. Haggard?

A. Well, it was down in that neck of the woods, in other words. I had been in that area and we had put this well in together, you know, three of us, '46, I guess it was, and he had land on both sides up there and I figured he needed it worse than anybody, see, and so before I sold it, in other words, I thought of him and I called him up and asked him was he interested or something and he

(Testimony of John Butler.)

says, "Where are you?" And I says, "I'm home," and he says, "Are you coming to town?" I says, "Yes, I am," or "I can," one of the two; he [64] says, "I will be down to the Adams Hotel in a little while; come in," or "We will get together," or "I'll see you," something like that, and we got together and started the deal.

Q. What was the total amount of the total business offer? A. The \$48,000.

Q. \$48,000? A. Yes.

Q. Was it your intention to sell the property at that time? A. Yes.

Q. It was?

A. Yes, I was going to sell, in other words.

Mr. McLane: Would you pin that, Mr. Clark? By "at that time," are you referring to Mr. Talby?

Mr. Clark: Well, we will clarify it.

The Court: I think the witness was clearly referring to Mr. Talby at that time.

Q. (By Mr. Clark): Did you intend to sell this property when you consummated this deal with Mr. Haggard? A. Yes.

Q. You did?

A. If I hadn't went that deal that day, I would have went in escrow with them.

Q. By "them," you mean the Talbys? [65]

A. Yes, sir.

Q. Would you have considered selling this property for \$24,000? A. No, sir.

Mr. McLane: Object to that as speculation, your Honor.

(Testimony of John Butler.)

The Court: Overruled.

Q. (By Mr. Clark): Would you have sold this property for any other price than \$48,000?

A. No, sir.

Q. Can you explain to the Court why it was that these instruments were drawn up the way they were rather than as a straight purchase agreement?

A. Well, sir, I don't know myself, in other words.

Q. Directing your attention to Petitioner's Exhibits 8 and 10, to Petitioner's Exhibit 8 in particular, can you identify that instrument?

A. That is the mortgage we made, isn't it?

Q. Is that the mortgage for the loan that you made in 1949?

A. Well, it must be, Valley Bank.

Q. Thank you. Can you explain to the Court just what transactions took place between you and Mr. Haggard in connection with this mortgage?

A. Well, along in that spring there, my [66] boy was building a little house and I run out of money and I needed some money and I figured I had a little equity down there and I called him up and asked him about putting it in the Equitable Life Insurance loan for \$12,000, or maybe I went out to see him. I don't know whether I talked to him over the phone or not and I went out to see him and met him out at the fair ground and I talked to Mr. Gallin down at the City Bank, about it, and so Mr. Haggard went in his office and called up Mr. Gallin and talked to him about it and I

(Testimony of John Butler.)

went on down and put the loan through. I don't know what the conversation between Mr. Haggard and Mr. Gallin, I didn't hear, but I got about \$5500—\$600 after they paid the National Farm Loan Association loan off, you see.

Q. Was there an existing mortgage on the 160 acres? A. Yes.

Q. Was that mortgage existing at the time on February 8, 1953—February 9, 1948?

A. Yes.

Q. And did you pay that mortgage off?

A. I paid off, sure.

Q. Out of the proceeds of this \$12,000?

A. Yes, sir.

Q. And did Mr. Haggard agree that he would, either then or sometime in the foreseeable future, assume this mortgage of \$12,000? [67]

A. Well, I understand—that is what they told me down at the bank. Mr. Gallin told me it was all right, go ahead and put it on there and he would assume it, in other words.

Q. Did you at any time make any payment on that \$12,000 obligation? A. No.

Q. Directing your attention to the latter part of 1949 or the early part of 1950 when the deed—over to Mr. Haggard was made, did this assumption of this mortgage for \$12,000 constitute a part of the consideration for purchase of the property?

A. Well, yes, it was a final payment. In other words, final of that \$24,000, last \$12,000, in other words.

(Testimony of John Butler.)

The Court: It is perfectly obvious it was deducted from the purchase price. There wasn't any dispute,——

Mr. McLane: Mr. Haggard testified, your Honor.

The Court: ——about that, and I would say it would be impossible for there to be any question about that.

Mr. Clark: Yes, sir.

Q. (By Mr. Clark): Mr. Butler, did you pay any assessments or anything at all toward the property?

A. Nothing.

Q. After 1948, February 1948?

A. Nothing that I remember.

Q. Directing your attention to the sketch on the [68] blackboard, it is obvious that the 160 acres is adjacent to the road. During the period of 1948 to 1950, did you ever travel on that road in your automobile?

A. Which is that? You mean around the place?

Q. You see the area marked "road" at the top there?

A. Yes.

Q. Did you travel that road at all?

A. Not very often; once in awhile, once or twice a year, go down to the reservation, go down, turn south there, go down to the reservation, but not very often.

Q. Did you ever notice any activity on that piece of land during that period?

A. Well, one time I was going by there, somebody was farming it, somebody was really farming it. Mr. Haggard's brothers, they are good farmers.

(Testimony of John Butler.)

Q. Do you recall seeing any improvements being made on the land?

A. Well, I noticed—I don't know when it was, that first year or second year—they had overhauled the rest of the fence around and maybe it's been done since, I don't remember, and, anyway, they leveled, did some leveling on the west side. I saw some caterpillars in there. I believe it was fall or summer, one or the two, and they was planting alfalfa.

Q. Can you pinpoint the time on that?

A. I don't know whether it was '48 or '49 or where. I [69] know they did some work on it, had a nice stand of alfalfa on it there.

Q. Was it either in '48 or '49?

A. Well, I don't know. I can't remember whether it was one year or the other, but I believe it was either the first year or the second year. Now, I could be wrong.

Q. Was that before the deed was issued to Mr. Haggard?

A. Well, I believe it was. Now, I don't know. I can't remember now. This thing came up a couple of years ago and all of that stuff, you know, I can't remember whether it was '48 or '49 or '50.

Q. Did you carry any type of insurance on this property after February of 1948?

A. Well, there was an insurance policy on this little house down there, but I don't remember even giving it to him or whatever happened to it. I don't know.

(Testimony of John Butler.)

Q. Did you pay any premiums on that insurance? A. Not since.

Q. Mr. Butler, were you familiar with the land values in the immediate neighborhood?

Mr. McLane: Objection, your Honor. If he is going to have him testify as to the fair market value of land. He hasn't qualified him.

The Court: All he asked him now is whether he knew land values. I don't know what his answer is going to be. He [70] hasn't asked him anything except what might relate to his qualifications. If you object on the ground that it is not proper cross examination, I will sustain it and there is certainly nothing in direct examination that had anything to do with this witness testifying as to the land value, but it is up to you as to whether you want to object or not on that ground.

Mr. McLane: I will object, then; it is not within the scope of direct examination.

The Court: Objection sustained.

Q. (By Mr. Clark): Mr. Butler, did you rent any other real estate in that area during the years '46, '47, and '48?

A. I rented 240 acres in the fall of '45, I believe, for five years for \$15 and assessments. Assessments cost around seven, seven-and-a-half, eight dollars if I have two acre-feet of water. Otherwise, I have paid the assessments.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

(Testimony of John Butler.)

The Witness: Then, in 1950, I bought half of that 240 acres and released the other back for \$30 an acre the first year, \$27.50 the second year, and \$25 the third year. That was in '53, and I released it back last September, a year ago, for \$30, \$3600, \$120 a year for last year, this year, and next [71] year.

Q. (By Mr. Clark): How does that property compare with the 160 acres under consideration here?

A. Oh, it is all in the same area except this land here is down in a little valley to itself down there.

Q. Is this land as valuable as the 160 acres?

Mr. McLane: Objection, your Honor, on the ground it is not within the scope of direct examination.

The Court: Objection sustained.

Mr. Clark: No further questions.

The Court: Mr. Butler, I think you testified that when you got together with Mr. Haggard on the morning when these papers were drawn up, that it was your idea to sell this property for \$48,000.

The Witness: Yes.

The Court: Is that what you testified to? Between the time you were in the coffee shop together and the time you got to Mr. Merrill's office, were you and Mr. Haggard continuously together?

The Witness: Until we went up to the office, yes.

The Court: Can you tell me why or wherefore or just what happened, if you know, as to how this got changed over from a \$48,000 sale to a lease for

(Testimony of John Butler.)

\$10,000 for a little less than the entire year '48, \$12,000, '49, \$2,000 option and \$24,000 [72] purchase price? What happened, if you remember, that moved it from one to the other?

The Witness: I discussed it, they discussed it.

The Court: Who discussed it?

The Witness: Mr. Merrill, Mr. Haggard, and myself, and they agreed and I agreed to it at that time that way.

The Court: Well, who suggested it, do you know?

The Witness: I don't remember.

The Court: Did you suggest it?

The Witness: No, sir.

The Court: Did you question it?

The Witness: No, sir, I didn't then, but still, though, it wasn't clear in my mind.

The Court: And Mr. Merrill was Mr. Haggard's lawyer?

The Witness: Well, I don't know if he was his or not. We both went up to this lawyer.

The Court: At whose suggestion?

The Witness: Mr. Haggard's.

The Court: Did Mr. Merrill ever do any work for you prior to that time?

The Witness: No, sir.

The Court: All right. That is all I have to ask him. Any redirect?

Mr. McLane: Yes, sir, I have a few more questions. [73]

(Testimony of John Butler.)

Redirect Examination

Q. (By Mr. McLane): Mr. Butler, when you leased the property to Mr. Strom in 1947 for the sum of \$4,000, did you pay the taxes and assessments?

Mr. Clark: Objection.

The Court: Overruled.

A. I paid the taxes and assessments, I believe.

Q. (By Mr. Clark): Do you recall how much they were?

A. Oh, I think the assessments was about \$1 an acre, \$156, something like that. Now, it wasn't too bad, the taxes wasn't too bad. I don't remember what they were.

Q. Do you have any idea what the taxes were?

A. No, sir, I can't remember.

Q. So that you got the \$4,000 lease, the taxes and assessments, is that correct?

A. That's right.

Q. Who did you purchase this 160 acres from?

A. From Clyde Ewalt.

Q. What were the terms of the purchase?

A. Oh, I was paying—I paid—I don't remember what I paid down, but I assumed this Federal loan, see, and I was carrying it and I was paying them \$5,000 a year plus the interest. [74]

Q. Isn't it correct that you paid nothing down, Mr. Butler?

A. No, I paid \$10,000 down, I think.

Q. And what were your payments each year?

(Testimony of John Butler.)

A. \$5,000.

Q. Did that include interest?

A. No, plus the interest.

Q. Why didn't you accept the offer of Mr. Talby for the sum of \$48,000?

A. Well, Mr. Ewalt, I'd seen him a little while before then and he was going to build an apartment house up in San Francisco. He worked for the John J. Plough Company. So, in other words, he'd like to get this money out of this deal as quick as he could so he could go ahead with this apartment house. He had been tied up there during the war and he had some money tied up to go in this deal so he wanted to get his money out of this so he could put it in this apartment house as soon as he could. I had a couple of friends, one of them was a banker and another was a man who was head of a big co-op there, and I served 13 years on the board of directors of this co-op, and they told me, they kept arguing to me, they said, "If you owe any money, you better get yourself into shape because this thing is going," so I got, and I had a boy just come back from the Army and he was in college——

The Court: Now, gentlemen, what are we getting into now? [75]

Mr. McLane: Your Honor, I am trying to show here that Mr. Butler did not accept that offer for a good reason, that he was in need of cash and couldn't get it under terms of that agreement and that is why the down payment was very minor and

(Testimony of John Butler.)

it was to be paid, as he has already testified, in ten annual installments, and for that reason——

The Court: All right. Go ahead.

The Witness: (Continuing) In other words, I was anxious to get this money out just as quick as I could so I could pay Mr. Ewalt his money and that is what I did. And another thing, I knew he has this other land down there and I wanted to see him get this all because he needed it all.

Q. (By Mr. McLane): In other words, you wanted to get your money out fast?

A. That's right.

Q. You testified——

Mr. McLane: Just a question or two more, your Honor.

Q. (By Mr. McLane): You testified that, as I recall, you made about \$25 or \$30 an acre on the property in 1946?

A. Somewhere around that figure, something like that, made about a ton of grain. Now we make two tons.

Q. That is approximately \$4500?

A. Somewhere around in there.

Q. You had payments to meet of what? [76]

A. \$5,000.

Q. Plus interest? A. Yes, sir.

Q. And did that \$4500, was that net to you or did you have deduct from that your taxes and assessments and so forth?

A. I don't remember. I remember I went out to the old mill and got this \$5,000 and paid my pay-

(Testimony of John Butler.)

ments first of January. In other words, I got an advance in '48 and then when I got this first check I went and paid it back and paid Ewalt off then right away, got his out of the way.

Q. Mr. Butler, when the transaction was proposed to you by the Talbys of, say, \$8,000 down, as I recall, and the balance over a period of ten years, you are a farmer of long standing, isn't the effect of such a sale that the purchasers buy your farm out of the profits of the farm?

A. Well, yes, that is the way a lot of us buy, out of profits.

Mr. McLane: That is all.

Recross Examination

Q. (By Mr. Clark): Mr. Butler, how much did you owe to Mr. Ewalt?

A. I think around \$22,000. I am not sure.

Q. About \$22,000?

A. Somewhere around there. [77]

Q. And you used the first payment that was made by Mr. Haggard as part of that obligation, is that correct?

A. Well, he got his money out of this \$24,000, and he got it all in twelve months after the deal we made.

Q. And that is the \$24,000 paid in '48 and '49 or in 1950?

A. '48 and '49 and this 1950, he assumed \$12,000 and I got \$12,000. In other words, I had to sign

(Testimony of John Butler.)

it over to the Valley Bank for a home in other words. They got it.

Mr. Clark: Yes. Thank you.

Further Redirect Examination

Q. (By Mr. McLane): Mr. Butler, did you discount the debt that was owing to Mr. Ewalt at that time? A. No, sir.

Q. You paid him the full amount?

A. Plus 6 percent.

The Court: All right. Thank you, Mr. Butler.

The Witness: How long am I going to be tied up?

The Court: If counsel are willing—as far as I am concerned, you can be excused now.

Mr. Clark: Does counsel want Mr. Butler to remain for any reason?

Mr. McLane: No.

The Court: Very well. You are excused. [78]

(Witness excused.)

Mr. McLane: May I state for the record here what I propose to do? What I would like to do here, if it is agreeable with Mr. Clark, your Honor, is to attempt to qualify this witness as an expert for the purpose of appraising farm lands in the area in which this particular land was located and at that time ask, as is recommended by Mr. Tracy, what his opinion is of the fair market value and then, instead of going question by question what the basis for that opinion is, offer into evidence a

report which he has prepared stating the basis for his opinion.

I thought, in that way, possibly Mr. Clark would have time to examine it and we could avoid the necessity of my questioning him one by one.

The Court: Give Mr. Clark a copy of it and see whether he is willing to do that.

Mr. McLane: This is nothing novel, I don't think, your Honor. Mr. Neblick did that at one occasion.

The Court: I am not shocked by it, Mr. McLane.

Mr. McLane: Of course, it would be understood, your Honor, anything that appears in here is open to cross examination.

The Court: I have that in mind.

Mr. Clark: Your Honor, I think we are going to object to the introduction of this appraisal. We have never seen [79] this before and it takes consideration on it.

The Court: Mr. Clark, nobody is attempting to force you into anything, but if this witness is going to testify at great length, it is going to make a long record. Now, I am perfectly satisfied to have this witness go on with his qualifications and I am perfectly satisfied to extend the noon recess for such reasonable amount as may be suggested for you to examine this report. It is pretty obvious that whether the report goes in or not, the witness is going to testify substantially to what is in it, and the only problem will be whether what is in it is admissible or not.

I am willing to give you plenty of opportunity

to look at it and it probably will be one of the most convenient ways for you to note your questions on cross examination. If you feel that, under all circumstances, you will be unalterably opposed to having the report come in, even subject to objections, then we will have to go on with the witness.

But I will give you plenty of time to examine it before you make your decision.

Mr. Clark: Thank you, sir.

The Court: All right. Go ahead with your qualifications. We can get that out of the way probably in a few minutes and then we can recess for lunch. Whereupon,

WAYNE M. AKIN

a witness called by and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address, please.

The Witness: Wayne M. Akin, 801 North 1st Avenue, Phoenix, Arizona.

The Court: I am sorry. I didn't get the spelling of your last name.

The Witness: A-k-i-n.

Direct Examination

Q. (By Mr. McLane): What is your present occupation?

A. I am a professional appraiser and president of the Western Farm Management Company.

(Testimony of Wayne M. Akin.)

Q. How long have you held the job as president of Western Farm Management Company?

A. Since 1934.

Q. Please state the extent of your college or your education.

A. I have approximately 6 years of college training in the University of Pennsylvania and Colorado A & M College, Bachelor of Arts degree or Bachelor of Science degree, excuse me, in 1918 and Master of Science degree in 1925.

Q. What were the major courses of study during that [81] period of time?

A. At the Horton School of Finance and Commerce at the University of Pennsylvania, I studied business finance and business administration, taking some courses in animal husbandry in the veterinary school at the University. My major at Colorado A & M was in animal husbandry with post-graduate work in agronomy and education.

Q. After your graduation from college and prior to the year 1934 when you testified you became head of Western Farm Management, what was your occupation or business?

A. I was in the United States Army for a little over a year, and I went in business as a real estate and loan business, mortgage loan business, abstract business, later selling that out; became Smith-Hughes agricultural teacher, and then superintendent of schools at La Porte and Buena Vista, Colorado for some eight or nine years, and then organized a business of visual and auditory aids

(Testimony of Wayne M. Akin.)

to education for two years, and then organized the Western Farm Management Company.

Q. During the period that you just described, were you ever called upon for a fee to make appraisals for the purpose of making loans or settling estates or for any other purpose? A. Yes.

Q. Appraisals of what type of property?

A. Farm and ranch property.

Q. Are you presently a director of any corporation? [82] A. Yes.

Q. Which one?

A. Well, Western Farm Management Company and the Mountain States Telephone-Telegraph Company.

Q. Are you presently chairman of any interstate stream commission or any organization of that sort?

A. Yes, I am chairman of the Arizona Interstate Stream Commission.

Q. Mr. Akin, what is the primary business of Western Farm Management Company?

A. The management and operation of agricultural properties, ranch and farm.

Q. How many do you manage and operate approximately?

A. At the present time—let's do a little checking. We are operating about 3,000 acres of irrigated land and ranches, involving approximately 2500 cattle.

Q. In the course of your work with Western Farm Management, have you ever been retained for

(Testimony of Wayne M. Akin.)

pay to make appraisals of farm property?

A. Yes.

Q. Would you name briefly some of the persons or corporations for whom you have or presently do appraise farm property?

A. Well, in the field of loans, we have done extensive appraising for the Connecticut Mutual Life Insurance Company [83] and the Northwestern Mutual Life Insurance Company, Valley National Bank of Phoenix, First National Bank of Phoenix, the Deseret Livestock Company in Salt Lake, the Tovrea Land and Livestock Company, Phoenix—how many do you want? There are innumerable small——

Q. Are you an accredited rural appraiser?

A. Yes.

Q. Will you explain to the Court what the requirements are for membership as an accredited rural appraiser?

A. Well, accrediting is done by the American Society of Farm Managers and Rural Appraisers. It is a professional organization, the design of which is to undertake to qualify appraisers before the public with a control that is comparable to C.P.A.'s. In other words, to qualify for the examination, it is necessary to—the applicant must have had a degree in agriculture from a recognized agricultural institution of higher learning, must have made a minimum of 250 appraisals for which he is paid a fee, including a written report to the client, must subscribe to the ethical standards of the so-

(Testimony of Wayne M. Akin.)

ciety and then take a three-day written and oral examination conducted by a board of examiners consisting of three professors of accepted agricultural institutions and two accredited rural appraisers and, having successfully passed the examination, qualifying as indicated, the Society issues certification.

Q. Have you ever held office in any societies of [84] appraisers? A. Yes.

Q. Which one?

A. I have been president of the American Society of Farm Managers and Appraisers.

Q. What year? A. 1954.

Q. What is the Range Appraisal Committee?

A. About 1949, the Society appointed a committee of representative appraisers throughout the western states for the purpose of undertaking to bring in to order a uniform pattern, relatively uniform pattern of appraisals for ranches, particularly those involving large quantities of public lands, and the Commission worked over a period of two years organizing a pattern for appraisal.

Q. Have you ever held office with that committee at any time?

A. I was chairman of that commission.

Q. What is the total number of years experience you have had in appraising farms?

A. I began appraising farms professionally in 1919 and then intermittently, as I have indicated, since.

Q. How many appraisals for pay of farm prop-

(Testimony of Wayne M. Akin.)

erty do you estimate that you have made during that period of time?

A. I wouldn't know how to go about it. As I remember, [85] when I was examined as an accredited appraiser, I had then made something over 300 appraisals and I made a lot since.

Q. Referring to the appraisal of the Johns Ranches, Inc., approximately what was the amount of property involved in that appraisal?

A. About two million and a half.

Q. And by whom was that appraisal made?

A. It was made for the Valley National Bank.

Q. You mentioned Deseret Livestock Company. Approximately what was the amount involved in that appraisal? A. About three million.

Q. For whom was that appraisal made?

A. That was made for the Deseret Livestock Company.

Q. You mentioned the Tovrea Land and Cattle Company——

The Court: I don't think we have to go into any more of those.

Mr. McLane: All right.

Q. (By Mr. McLane): How many appraisals have you made of farms in the 160 acre class?

A. Well, there would be hundreds. I wouldn't know.

Q. Mr. Akin, what fee did you receive for making the Johns Ranch Enterprises appraisal?

A. \$5,000.

Q. Were you asked by me and by Mr. Haggard

(Testimony of Wayne M. Akin.)

to make an [86] appraisal of the Butler 160 acres involved here as of February 9, 1948? A. Yes.

Q. Have you done so? A. Yes.

Q. What was the agreed fee that you were to be paid by Mr. Haggard? A. \$500.

Mr. McLane: Your Honor, I have reached that point.

The Court: Of course, Mr. Clark, you will understand that no one is suggesting that you admit the correctness of what is in this report. It is merely a question of whether you are willing to facilitate proceedings by admitting that the witness would testify to what is in the report, and my proposal is to recess for lunch at this time until 2:15. If you need any further time to examine the report, I will grant you additional reasonable time and the Clerk will send for me when you are ready.

Otherwise, I will be ready to resume at 2:15.

Mr. Clark: Thank you, sir.

(Whereupon, at 12:15 o'clock p.m., the hearing was recessed, to reconvene at 2:15 o'clock p.m., same day.) [87]

Afternoon Session—2:15 o'clock p.m.

Whereupon,

WAYNE M. AKIN

resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. McLane): Mr. Akin, were you familiar with the 160 acres owned by Mr. Butler in 1948 at any time prior to 1948?

(Testimony of Wayne M. Akin.)

A. Yes, I have known the property for a good many years prior to that time.

Q. Did the Western Farm Management Company at any time ever actually farm the same land?

A. Farm the subject property?

Q. Yes. A. No.

Q. Did you farm land in the vicinity?

A. Yes.

Q. Which land did you farm in the near vicinity?

A. The land that, on the map here, is marked, this Miller Johns 728, and the 320, we farmed for two years, I believe.

Mr. McLane: Now, as I stated, your Honor, I am going to ask this question and then offer the report in evidence.

Q. (By Mr. McLane): Mr. Akin, what, in your opinion, was the fair market value of Mr. Butler's 160 acres farm land on February 9, 1948?

A. \$21,750.

Mr. McLane: Your Honor, I now offer in evidence the report prepared by the witness stating the foundation upon which that opinion is based.

Mr. Clark: Your Honor, we will have to object to the introduction of this summary in evidence on the basis that it is a summary, does not give the Respondent an opportunity to object to the admissibility of the statements contained in it at the time they are going in, appears to be based in part on hearsay evidence and we feel that the best evidence

(Testimony of Wayne M. Akin.)

in the matter would be in the direct testimony from the witness.

The Court: Have you anything further to say, Mr. McLane?

Mr. McLane: No, sir, your Honor.

The Court: Very well, I will sustain the objection.

Q. (By Mr. McLane): Mr. Akin, what are the factors which are considered by you in appraising the value of farm land in the vicinity of Mr. Butler's 160 acres?

A. The farm land in Central Arizona, where the production of crops is entirely dependent upon irrigation, is primarily dependent upon the water supply. There is a lot of good land with relatively little variation in it, but there is a lot of variation in the water supply and, therefore, in [89] undertaking to establish the value of land, the first consideration is the availability in amount and cost of the water supply, the quality of the water which has a very important bearing on its usability and the crops that can be raised and its permanence and the fourth factor that is largely determining is, then, the quality of the land as such.

Of course, the price at which comparable land moves is very important.

Q. Did you actually physically view this property at the time you made the appraisal?

A. I made the appraisal in 1955, reconstructing conditions as of 1948.

(Testimony of Wayne M. Akin.)

Q. Could you give us a description of the subject property in terms of the geography?

A. Well, the subject property is located some 11 miles from downtown Phoenix, about four miles south and seven miles west, at which point the Gila and the Salt Rivers are approaching each other forming a peninsula and this property, this area generally is known as the Peninsula Country and has been in cultivation for many years.

Q. Is the water used by the property derived from the river that you mentioned, the Gila?

A. No, the water is now derived from pumps operated for the benefit of this area by the Salt River Valley Water Users Association. This land was put into cultivation early in the [90] century, in fact, late in the last century, and it is by direct diversion from the river. When the Salt River Project was put into effect and the water was dammed and diverted, it meant that the water that normally came down through these old ditches was cut off and, since it was cut off by the Water Users Association, they were under obligation to do something about it.

After considerable controversy, this land, largely having gone into the hands of one of the banks, Valley Bank and Trust Company as it was known at that time, predecessor of the Valley National Bank, negotiated a contract with the Salt River Valley Water Users Association, under the terms of which the pumps were to be operated for the use of this land.

(Testimony of Wayne M. Akin.)

There are some significant things in connection with that contract, one of which is that this was water-logged land, largely gone back to alkali waste. A drainage program was set up. Without going into the details of it, part of the consideration was the putting in of these drainage pumps for the relief of this area, supplying the water to a lower irrigation district known as the Roosevelt Irrigation District, and hence by exchange some water was allocated to this land.

By this means, the total water supply furnished was approximately three-and-a-half acre feet per acre. In addition to the three-and-a-half acre feet, the land owners had [91] the privilege of buying additional water insofar as the pumps would supply it. I don't know how much farther you want me to go in the discussion of this thing.

Q. Did you say, Mr. Akin, that you were familiar with this land itself in February of 1948?

A. Yes.

Q. What was the general appearance of the land, the subject property, and the surrounding property?

A. Well, this property lies just off the bank of the Salt River bottom——

Q. Just one moment, please, Mr. Akin. When you say Salt River, is there any water in that river?

A. No, the river is entirely dry and has become an unsightly desert because of the fact that all the water is stopped in the dams above. The area to the west and north is largely either abandoned farm

(Testimony of Wayne M. Akin.)

land or undeveloped desert. To the east, there is a series of shack-type, small tracts and farms and alkali desert. The land immediately south and east of the property which is now owned by Mr. Haggard is now well-farmed as much *in* the development has transpired since 1948.

Q. Do you know what the condition of the ditching was of this property, the Butler 160 acres, during the beginning of 1948?

A. Yes, it was open dirt ditch type of water supply, rather significant that particularly along the north side of [92] this property, the erosion from gopher activity was bad and, consequently, it was necessary to run a false ditch or secondary ditch inside the main ditch of the Peninsular and Horowitz Water Company ditch in order to protect the erosion on that north end, unsightly piece of waste land. Ditches, of course, are of a nature that are expensive to maintain.

Q. Now, with respect to the water that was delivered to this particular land in February of 1948, Mr. Akin, would you please describe, please tell the Court and myself how much water is delivered under the contract that you refer to or what the source of the water is, the total source that is delivered to the area.

A. Well, the water is entirely derived from pumps.

Q. What do you mean when you say "pumps"?

A. Which are basically drainage pumps. There are wells located—I can point them out, their loca-

(Testimony of Wayne M. Akin.)

tion. There are three wells that, from the standpoint of the district, served the Peninsula and Horowitz water area, the land of which is drawn on the blackboard, 2,262 acres,—

Q. These wells—

A. —to be accurate.

Q. —produce all of the water that is used to farm that land?

A. No, there are at least two private wells but those wells provide all of the water from which there is a firm water [93] right pertinent to that land.

Q. What is the condition of the water that is delivered to the land from the wells and from the Salt River Valley Water Users Association?

A. Well, those wells are very salty.

Q. Do you know what the water analysis of it is?

A. The average analysis in 1955 was 2,845 parts per million of total soluble salts.

Q. Did that condition prevail in 1948?

A. Yes, except that it was worse in '48.

Q. What is the effect of that amount of salt in the water on the farm land that is being farmed?

A. Well, it requires much larger than normal quantities of water because you have a continuous leaching problem.

Q. What do you mean by "leaching," Mr. Akin?

A. Well, for each 700 parts per million of total salts in an acre-foot of water, you'll put a ton of salt on the land, so that means that 2800 parts for

(Testimony of Wayne M. Akin.)

each acre-foot of water you'll put roughly four tons of salt. If you put five-acre feet of water on the land, you're going to, in the process of a year, add 20 tons of salt per acre. The extent to which that water is used and transpired by plants will leave that salt in the soil and it would accumulate in a short time to where the land would become useless except where you apply more water than the plants can use, carrying that excess salt [94] down into the drainage below the root zone.

Q. Is that what you call alkali land?

A. Yes.

Q. What was the cost approximately in 1948 of dropping a deep well for purposes of providing additional water to an area such as Mr. Butler's property?

A. Well, wells of the type which we are talking about, the well and pumping equipment together with the engine, would cost in the neighborhood of \$30,000.

Q. Was there any such well on Mr. Butler's property at the time you viewed it? A. No.

Q. Therefore, the only water that is available to that land is the water which is delivered by the Salt——

Mr. Clark: Objection, your Honor, this appears to be immaterial.

The Court: Well, he testified already that this Waters Users Association had three pumps which furnished the area. I don't see anything new about this.

(Testimony of Wayne M. Akin.)

Mr. Clark: It has been testified already. There were pumps.

The Court: I agree that it is a resumming up which is unnecessary but I don't see that it is worth arguing about.

Mr. McLane: Would you restate the question, please?

(The question was read by the Reporter.)

Q. (By Mr. McLane): River Valley Water Users Association?

A. That is a correct statement insofar as firm water is concerned. That is water that applies to an inherent right of the land to demand it. The only other water might be derived by purchasing from a private well.

Q. Without water from a private well, was the water available from the Salt River Valley Water Users Association sufficient to farm this land, Mr. Butler's 160 acres?

A. No, it was not sufficient to fully farm it.

Q. Could the farm be operated partially? That is, a portion of the area farmed.

A. Yes.

Q. Approximately what amount?

A. Well, strictly speaking, the firm water for the Peninsular and Horowitz area was only about 50 percent of the normal requirement.

Q. Would you please tell the Court what is meant in Arizona by the term "critical water area"?

A. Under the Arizona law, either the State Water Commissioner or the Water users and land

(Testimony of Wayne M. Akin.)

owners within an area can request that a critical area be set up after due hearings if the Commissioner, if the State Water Commissioner then declares the area critical, which means that the exhaustion or the use of the underground water is faster than the normal [96] replenishment and therefore that there is danger of exhausting the underground water supply, it is the duty of the State Water Commissioner to declare that water critical and stop all future drilling of wells for the purpose of irrigating new land.

Q. Is the area in which Mr. Butler's land or, rather, now Mr. Haggard's 160 acres which was purchased from Mr. Butler, now in a critical water area? A. Yes.

Mr. Clark: Objection.

The Court: What is the objection?

Mr. Clark: I object to that, that is a little too remote, whether it is now a critical water has no bearing on what the situation was in——

Mr. McLane: I intend to ask questions, your Honor, to show——

The Court: I don't know what the relationship is. According to this witness' testimony, if the land is declared critical, then you couldn't pump water for new farm developments. He hasn't said anything about limiting it as to old farm developments, yet. I am going to assume it is preliminary. So far, the witness hasn't said anything which is significant in relation to the last question, but we will see what direction it takes.

(Testimony of Wayne M. Akin.)

By Mr. McLane: [97]

Q. Mr. Akin, at the time, as of February 9th, 1948, was the Butler area—strike the question.

What is the cost of applying water to the 160 acre Butler tract, Mr. Akin—what was the cost, rather, in February 1948?

A. You are talking about the cost of the water now or the cost of irrigation and labor?

Q. The cost of applying that water to the land?

A. Well, I, of course, have no means of knowing accurately what it was.

Q. How would you describe the location of the land in terms of good, bad, or indifferent?

A. Well, being within easy reach of Phoenix, I would consider that, in general, it was well-located from the standpoint of facilities, such as schools, churches and all of the things that make a community desirable, but undesirable as to the immediate vicinity.

Q. What type of roads served the area?

A. Well, in 1948, the roads were dirt roads, relatively poor in the immediate vicinity, good roads as you approached the city.

Q. What is the classification of the soil in that area?

A. The subject property is quite uniformly silt loam of the Gila series, a medium textured very good soil.

Q. Is it necessary in order to farm [98] Mr. Butler's particular 160 acres that the property be leached more than once or——

(Testimony of Wayne M. Akin.)

A. Oh, certainly. When you are applying the amount of salt, you are to that land continuously, you got a continuous and perpetual job of leaching to do.

Q. What is the situation with respect to the drainage of that particular 160 acres?

A. It is satisfactory.

Q. Do you consider when appraising land any factor with respect to what type of crops can be planted and grown there?

A. Oh, very definitely.

Q. And what was in February of 1948 the situation with respect to Mr. Butler's 160 acres of land insofar as the type of crops that could be produced on that land?

A. Well, it was unsuited to any type of crop that requires a low frost situation. In other words, cirrus or any crop of that kind is out because of the alkali situation and the alkali water. Vegetables and melons and that kind of thing are impossible of successful production. So that insofar as any ordinary farming is concerned, it is limited to feed crops, hay, grain. It is a livestock type of operation. Cotton can be grown successfully but it is second-rate cotton land.

Q. When you appraise the value of farm property, do you consider as a factor the status of the land with respect [99] to the extent to which it has been levelled?

A. Oh, yes. I think it is significant that practically all of the subtropical type of land that is

(Testimony of Wayne M. Akin.)

standard in Central Arizona has to very excellently levelled if it is going to have a high level of production.

Q. Did you consider the factor in your appraisal of this property as of February 1948, did you assume, rather, or consider that a certain amount of levelling had been done after February of 1948?

A. I was aware of the fact that, during the investigation, that over \$100 an acre had been spent since that time. However, having farmed in that community for several years and having been familiar with it for 20 years, I was very well aware of the fact that that was a rough, tough piece of land in 1948.

Q. What was the housing which existed on the property during February of 1948?

A. There were a couple of very poor labor shacks.

Q. Do you consider comparable sales in making appraisals of farm property, Mr. Akin?

A. Yes, sir.

Q. Did you do that in this instance?

A. I did.

Q. And what did you discover?

A. I discovered that the land that is [100] immediately south of the subject property on the chart there, the McCallum 400 acres, was transferred in 1944 for \$100 an acre; that the area which adjoins the subject property on the east and which adjoins the McCallum property on the southwest, approximately 728 acres, was moved in 1946 at an

(Testimony of Wayne M. Akin.)

average value of \$192 an acre; the 320 acres, the most easterly area there, marks the Miller Johns, in 1948 was transferred at \$140 an acre——

Mr. Clark: Your Honor, I move to strike that last testimony on the basis that he is testifying to hearsay. He hasn't shown that he knows of his own knowledge what these prices were.

The Court: Well, Mr. Clark, I think you are a little late on that, but you can bring that out on cross examination as to the weight, if any, of the testimony.

Q. (By Mr. McLane): Mr. Akin, how did you acquire the information with respect to the amount that was paid for each of these three adjoining pieces of property?

A. The information in regard to the McCallum land was furnished by Mr. Haggard and the——

Mr. Clark: Objection. He is testifying right now to hearsay evidence, something that was told him. I move to strike the testimony.

The Court: Isn't it substantially in the record that Mr. Haggard testified to those same things?

Mr. McLane: Yes, sir.

The Court: When he was on the witness stand.

Mr. Clark: That is true.

The Court: This witness took the same factors into account. We already have it substantially for whatever it is worth in the record. If you want, Mr. McLane, to say to this witness, assume that these particular properties were sold for so much, is that a factor that you have taken into account,

(Testimony of Wayne M. Akin.)

why, we could probably back around it that way. I just don't feel that it makes that much practical difference as the evidence is already in the record and since about 80 percent of that he has testified to came in before there was any objection.

Mr. McLane: Yes, sir.

The Witness: Excuse me. I am a little confused. I don't know where to proceed from here.

The Court: Start a new question, Mr. McLane.

Q. (By Mr. McLane): From whom did you obtain the information that the adjoining pieces of property were sold or purchased in the amounts that you have just testified to?

A. In the instance of the McCallum land, it was entirely from Haggard, and verified by checking the record insofar as we could determine by revenue stamps, and, in the instance of the Miller Johns property, it was checked with Mr. [102] Miller.

The Court: Well, as to the Miller Johns property, I will have to strike out his answer unless you can corroborate it through some other witness.

Q. (By Mr. McLane): Mr. Akin, assuming that Mr. Haggard paid \$192 per acre for the adjoining Miller Johns land in the year 1946 in the amount of 728 and six-tenths acre, was that factor considered by you in making your appraisal of the value of this property as of February 1948?

A. Yes, it was.

Q. Assuming that Mr. Haggard paid the price of \$140 an acre for the 320 acres during the year

(Testimony of Wayne M. Akin.)

1948 from Miller Johns, was that factor considered by you in making your appraisal of a fair market value of this property during 1948?

A. Yes, it was.

Q. Do you know what the taxes, the assessed value on this property was during 1948?

A. Yes, sir.

Q. What was it? A. \$3,265.

Q. And what was the tax that was paid?

A. \$191.33.

Q. Do you know that of your own knowledge?

A. I took it personally off the records of [103] the Treasurer of the county.

Q. In making your appraisal, did you appraise as of February 1948 the entire 160 acres as so much acres or did you break that down, by acreage and buildings and so forth? A. I broke it down.

Q. And how did you do that, Mr. Akin?

A. I calculated the total water supply, or calculated the area which, in my judgment, had a sufficient water supply to handle it in a reasonably normal manner which, taking all factors into consideration, I thought was around three-quarters of the property. There are about five acres of roads and waste, so I set up 115 acres of usable land with an adequate water supply at \$150 an acre, took 40 acres that can only be used by fitting into a rotation with other land, valued it at \$100 an acre, and then give no value to the waste and roads and \$500 to the buildings, making a total of \$21,750.

(Testimony of Wayne M. Akin.)

Q. Did you take any pictures of the Butler property recently? A. Yes, I did.

Q. When?

A. Well, it was in February 1955.

Q. From your own knowledge of the property during the year 1948, is it your opinion that the pictures you took represent the condition of the Butler 160 acres during that period of time? [104]

A. No. As a matter of fact, the condition of the property is materially better now than it was in '48.

Mr. McLane: Mr. Clark is going to object to these, your Honor, so may I have them marked for identification, please?

The Clerk: Petitioner's Exhibits 10 to 17 marked for identification.

(The documents above referred to were marked Petitioner's Exhibits Nos. 10 through 17 inclusive, for identification.)

Q. (By Mr. McLane): Mr. Akin, I hand you Petitioner's Exhibits marked for identification 10 through 17 and ask if you will examine and identify them, please?

A. By identifying them, you mean you want me to tell you what they are?

Q. Yes, please.

A. Well, Exhibit 10 is characteristic of the farmsteads, if you can call them that, in the area lying east of the property.

No. 11 is taken from approximately the north

(Testimony of Wayne M. Akin.)

center side of the subject property looking east across the north end.

No. 12 is taken from the northwest corner of the property looking slightly south of east. [105]

No. 13 is a picture of the land adjoining the subject property on the north, this No. 13 being a formerly farmed area that has now been abandoned.

No. 14 is a picture of the river bottom, undeveloped land lying north of the property.

No. 15 is a picture of the farm directly west of the subject property.

No. 16 is a picture of the country adjoining the subject property along its eastern line and across the road north.

And, No. 17 is a farm approximately a quarter of a mile east of the subject property which shows the vicinity.

Mr. McLane: Your Honor I offer these exhibits in evidence for the purpose of showing the condition of the land in 1948 on the basis of the witness' testimony, that it had improved since then, and offer them for the reason that these visual aids will certainly show a condition of land that was no better in 1948 than today.

Mr. Clark: Objection, your Honor. These pictures are taken in 1955. It appears that they are remote, although the witness has testified to the fact that the property is perhaps generally better than it was in 1948.

The Court: Mr. Clark, I am going to sustain

(Testimony of Wayne M. Akin.)

your objection if you present it. Just what harm do they do you?

Mr. Clark: Well, there is no way in the world to tell [106] where those pictures were taken. They can take one little bad spot and take a picture of it.

The Court: All right. Objection sustained.

Q. (By Mr. McLane): Mr. Akin, have you prepared a map of the area, a drawing?

A. Yes, sir.

Q. Would you please take that from your report?

A. You want this deleted from the report, you mean?

Q. Yes, please.

Mr. McLane: May I have marked as Petitioner's Exhibit next in order, the drawing of the subject property and surrounding property prepared by the witness?

The Court: Petitioner's Exhibit 18 marked for identification.

(The document above referred to was marked

Petitioner's Exhibit No. 18 for identification.)

Mr. McLane: Your Honor, Mr. Akin has identified this already. I think it is unnecessary to go through the procedure again. This is offered in evidence for the purpose of providing a visual aid in making a determination on this case.

Mr. Clark: No objection.

The Court: All right. It will be received.

The Clerk: Petitioner's Exhibit 18 will [107] be admitted in evidence.

(Testimony of Wayne M. Akin.)

(The document above referred to heretofore marked Petitioner's Exhibit No. 18 for identification was received in evidence.)

Q. (By Mr. McLane): Mr. Akin, does the State of Arizona sell land to farmers?

A. Yes, sir.

Q. Under what terms is that farm land sold?

A. In general—of course, it may be sold in any terms set by the State Land Commissioner provided they are no less than—I should correct that, approximately 7 percent down and, I believe it is, 33 years—very long time—to pay out, 5 percent. That is approximately correct.

Q. Does the price per acre under terms such as those exceed greatly or at all the price per acre at which that same land transfers hands as between private individuals?

A. Yes, I think it is axiomatic that the easier the terms, the higher price that can be demanded.

Mr. McLane: That is all, your Honor.

Cross Examination

Q. (By Mr. Clark): Mr. Akin, did you at any time view this particular piece of property at any time during 1948 to your knowledge? [108]

A. I was working in the vicinity constantly. I don't remember specifically going on this property during 1948. I don't know whether I did or not, I just can't remember that particular period.

Q. You testified that you believed that this

(Testimony of Wayne M. Akin.)

property to be quite poor so far as the productivity is concerned?

A. I would say it has definite limitations.

Q. Well, what net return would you say could reasonably be expected from this property in 1947 or 1948?

A. Under what circumstances? I don't—

Q. As a farmer, farm land.

Mr. McLane: Well, I object to the question on the ground that I believe you haven't stated, Mr. Clark, what particular type of crop you are referring to.

The Court: Well, this witness is here as a valuation expert, Mr. McLane.

Mr. McLane: Withdraw the objection, your Honor.

The Court: And he has testified as to value of the land, but he didn't take into consideration earning capacity in some form or other, and I think the question may properly be answered.

The Witness: I will answer it this way: Land produces an income due to three factors. One, the thing that is being farmed, the basic ability of the land to produce the crop that is planted on it, and the management of the property in the [109] process. The management is quite important as the land itself. Therefore, in making an appraisal, it is customary to calculate an income on the typical crops grown in the area by an operator of typical ability.

Now, that qualification, I would say that a net

(Testimony of Wayne M. Akin.)

return to land, but not to land and management, in other words, the return to capital should be on the order of \$3,000 to \$4,000 a year in 1947.

Q. What would you say would have been a reasonable rental then for this property in 1948?

Mr. McLane: Object to the question on the ground that the Tax Court has stated over and over again that rent need not be reasonable, if that is the purpose for which you are asking the question, Mr. Clark.

The Court: The objection is overruled. The issue here isn't solely whether the rent was reasonable or unreasonable. The issue is whether it was rented or not. Now, this witness has testified to an earning capacity. He has given prior testimony as to actual rental for the year before. I think it is material to the determination of this case as to what fair rental value of this property was in February of 1948 and I think the question directed to this witness to that effect which I understand the question to be would be proper.

The Witness: Will you restate the question, please? [110]

Q. (By Mr. Clark): What would you say would have been a fair or reasonable rental charge for this property, this 160 acres of property, in 1948?

The Court: Amend that to February of 1948, not that I am asking for only one month's rent, but when you are talking about determining fair rental

(Testimony of Wayne M. Akin.)

value, you determine it as of a particular date, naturally, looking to the future.

The Witness: I'd like to qualify what I am saying, Judge. I know what this rental was—I couldn't help knowing it in this investigation.

The Court: I know you know what it was, but you also know what you figure the earning capacity of it was. Now, we are talking about fair market or fair rental value, not what Mr. Haggard paid and not what some written document said he paid; eliminating Mr. Haggard from the scheme of things and turning you back to February of 1948 and asking you to determine as an expert, state an opinion as an expert, what the fair rental value was at that time.

The Witness: The fair rental must be qualified by whether you are taking the fair rental in its relationship to something else or whether you are taking it all by itself. The fact of the matter is that this was not taken by itself and as such——

The Court: That is not the question, now, but so far as that is concerned, you could say the same thing about your valuation of some \$21,000 for the property itself. You could [111] take all of your factors into consideration. You could say that if it was going to be neglected, it wasn't worth anything. If a well was going to be dug, it might be worth something else. If, by any chance, the water supply in the area was changed, it could still be something else, but you know perfectly well as a valuation man that there is such a thing as a fair

(Testimony of Wayne M. Akin.)

market value of property to which you have already testified and, on the same principles there is such a thing as a fair rental value.

If there are any exceptional circumstances which made this particular rental higher in the instance, it would still be higher than fair rental value. It might be legitimate rental value, but we are talking about fair rental value and I think you understand quite well and I feel that you should give us your opinion unaffected by what you happen to have determined from Mr. Haggard or anyone connected with it.

The Witness: As nearly as I can answer the question forthrightly, if this land, taken by itself, were being rented to a typical operator in February 1948, it would probably have rented for around \$5,000.

The Court: Why would the rent be \$5,000 if its productivity was \$4,000?

The Witness: For the simple reason that, at that time, there was a terrific scramble for land in rental. The pattern of occupancy from sale, pattern of sales was bad and farmers [112] were trying to get land under rental conditions.

The Court: Would you say the fair rental value had the faintest relationship to \$12,000 a year?

The Witness: Yes, I would. There was a lot of land leased at that time for around that figure.

The Court: All right.

The Witness: In fact, I personally rented some land at that figure at that time.

(Testimony of Wayne M. Akin.)

The Court: Well, you may have done it and it may have been comparable land; it may not have been. I must say there is a hiatus in my opinion between productivity of \$4,000 a year, rental value of \$5,000, and rental value of \$12,000 a year.

The Witness: I quite agree, but in trying to make a market value, these extraneous factors that I was mentioning all enter into the thing. They are just as inescapable as they can be.

The Court: All right. If your counsel wants you to, you can explain extraneous factors, if you know them of your own knowledge. We haven't stopped at this point. Counsel for Mr. Haggard can ask you anything he wants on redirect. In the meantime, Mr. Clark can ask anything he wants and I have the privilege of asserting myself once in a while, too. Go ahead.

Q. (By Mr. Clark): Then, as [113] I understand your testimony, it would not be unreasonable to rent for 12,000 property which you have valued at slightly over \$21,000?

A. No, it wouldn't be unreasonable in the light of lots of other circumstances that surround this thing.

Q. What is the customary ratio to rental in relation to fair market value property in this area?

A. In an economy such as there is in Central Arizona, there actually is relatively little direct correlation. There's so many factors that enter into the desirability or the demand for land that if you

(Testimony of Wayne M. Akin.)

take the historical rental on land, you will now be able to establish a very definite pattern.

That is the reason why, in appraising, we attempt to go back to a typical situation, the land by itself, rather than taking an historical situation because you get so many distortions in the historical picture that you can't come up with a valid analysis of the situation.

I can document those statements if it is desirable.

Q. Mr. Akin, say in the area as a general situation, would you say that 10 percent of the value of the property would be a fair rental or 1 percent monthly?

A. Do you mean a rental that might reasonably be expected? Is that what you mean?

Q. Exactly.

A. It would be quite unusual if—well, let me put it this way: There are many instances in which there is a very [114] wide diversity actually in rentals away from 10 percent. In general, land that is within the area of the Salt River Valley Water Users Association, 10 percent will follow a reasonable accurate pattern. When you get outside of the Salt River Project as such, you get into these unusual pumping and diversified water situations. You will find some very unusual rentals that bear no relationship to 10 percent. It may be anything from 2 or 3 percent to 50 percent. In an area that is precarious as to water, it is not at all unusual to have a special use of it, rental for

(Testimony of Wayne M. Akin.)

special use for a short period at a very high fraction of the sale value because your sale value carries over to a permanent capitalization and in times such as we were going through at the end of the war there were many instances when rentals were clear out of proportion to stable, long-time rentals, just as the same thing was true, for instance, in the stock market, screwy situations.

Q. Were you aware of the fact that there was a well dug in the immediate vicinity to Mr. Butler's property? When I mention Mr. Butler's property, I am referring to this 160 acres of property, so far back as 1946 or 1947, that gave Mr. Butler access to water for irrigation purposes.

A. Yes, sir.

Q. Did you take that into consideration in making up your—

A. I did, but I valued this as though that [115] were not pertinent to the property which is my understanding it is not. It is a right, it is available, but not appertinent to the property.

Q. But Mr. Butler owned a part of that pump in that well and when he sold the land that well and water right went with the property?

Mr. McLane: Is any of that in the record, Mr. Clark?

Mr. Clark: Yes, Mr. Butler testified.

Mr. McLane: I don't recall it.

The Witness: Excuse me. I don't understand what you are asking me.

Q. (By Mr. Clark): You stated that the well

(Testimony of Wayne M. Akin.)

was not appertinent to the property itself. In other words, the well wasn't on the 160 acres of land.

A. No, that isn't what I mean by pertinent. None of these wells are on this land.

Q. That is right.

A. But the water from the other wells is appertinent to the land. The land is a fee simple title, fee simple title to the land includes certain water. The Peninsular and Horowitz Water is a part of the fee simple title of that land, it is appertinent to the land, cannot be separated from it. This other we are talking about is not appertinent to the land, can be separated from it, and therefore is something separate [116] and hence it should be valued separately which I did, and the value of the water, if you are going to consider it then, the value of the interest in the well should be added to my appraisal; if you are going to take that, it is just as separate as though it were a truck or something else that could be separated from the land, you see.

Q. Now, if that land were on the Butler property, on the 160 acres, would your appraisal of the property have been different?

A. Yes, that is, if the well had been owned by Mr. Butler, is that your question? That well could have been on the Butler property and not belonged to Mr. Butler, just as the other wells are on other—well, the other wells are on property, I believe, that belongs to the Salt River Valley Water Users Association. In other words the location of the well

(Testimony of Wayne M. Akin.)

is not—does not fix absolutely the ownership to the right to that water in that well.

Now, if the well were on the land and under the law appertinent to it, then it would certainly have a very definite bearing on the value of the land, which in my judgment it does not have under existing circumstances.

Q. If that well was partly owned by the owner and he had rented some water rights to his neighbors, would that have affected the valuation of the land? A. Insofar as—— [117]

Q. This is a hypothetical situation, of course.

A. Yes. If he owns a fraction of the well?

Q. Yes.

A. Yes. That well will be added to the thing, just the same as you sold the land with a truck connected with it. Then you value the land and add the value of the truck, you see. You buy the two together. So that if Mr. Haggard was buying a fraction in the well, then whatever that fraction was should be added to my appraisal of the land. Do I make myself clear?

Q. Are you familiar with the water table?

A. Yes.

Q. In this area? A. Yes.

Q. Isn't it a fact that this water table lowers from year to year and has been for some time in the past? A. That is correct.

Q. Isn't it a fact that when there is alkali in the soil when your water table is high, that it maintains an alkali in the upper part of the soil? How-

(Testimony of Wayne M. Akin.)

ever, as the water table lowers, the alkali seems to soak in, goes deeper, and therefore makes the surface land more capable of production?

A. I would not accept the statement that you have made. If you want me to, I will undertake to explain to you what does actually transpire. [118]

Q. I think that will be very helpful.

A. Do you want me to go ahead?

Q. Yes.

A. If the water table is close to the surface, then the capillary action from that water table continually carries water toward the surface. It is evaporated off the surface. It is very difficult, if not impossible, to leach out the salts that are there by accumulated in the upper layers of the soil. When you drop your water table down far enough so that by adding water on top, you can keep diluting that salt and carrying it down through the root zone. You can then make that root zone productive.

Now, in order to maintain the productivity of that soil, you have got continually to be putting water in excess of that used by the plant, carrying it down below the root zone and hence out of the way of the plants, and that is exactly what I am saying about the necessity for using larger volume of water and leaching. That is what leaching is, diluting the salts, carrying them down out of the root zone.

Q. You mentioned on direct examination that there is some type of water emergency in that area.

(Testimony of Wayne M. Akin.)

I cannot recall your designation of that situation.

A. I didn't designate it. I think you are referring to the fact that counsel asked if this was a critical area.

Q. That is the word. [119]

A. If it had been declared a critical area by the State Water Commissioner, and I said that it had been.

Q. When was it declared?

A. My recollection is that it was either late in '53 or early in '54, something like two years ago.

Q. Mr. Akin, does the state valuation for property tax reflect the actual valuation of the land?

A. Proportionately, but not—I mean the assessed value is deliberately very much below the true market value of the land, but presumably—

Q. That is what I wanted to know.

A. The various properties are *equalied*, supposed to be all the same proportion, theoretically.

Mr. Clark: No further questions.

Redirect Examination

Q. (By Mr. McLane): Mr. Akin, what is the economic effect on a farm operator of a continuously lowering water table in his wells?

A. Well, the lower the water table, the higher the cost of lifting the water out so that the water costs more as the water table goes down.

Q. Does it reach a point where it is no longer feasible to farm when that water level has dropped to a certain level? A. Yes.

(Testimony of Wayne M. Akin.)

Q. In this particular area of the Butler [120] property, you testified, or at least the question by Mr. Clark, it was stated that the water level was continuously dropping. Was that the case in 1948?

A. Yes.

Q. Is it for that reason that an area is declared a critical water area? A. Yes.

Q. So that prior to the time in areas declared a critical water area, you have reasonable expectations that it will be on the basis of continuously dropping water level?

A. I didn't understand the question.

Q. Strike the question.

In an area where the water level is continuously dropping, can you reasonably expect, in the light of Arizona's water conditions, that that area will become a critical water area if the water is not replenished through some other source?

A. Yes. The term "critical" means that the water, that more water is being withdrawn from the underground supply than is being returned to it, and therefore it is being exhausted, just like a mine.

Q. That is why we are arguing with California, is that correct? A. That is correct.

Q. Now, what is the proportion—Mr. Clark asked you a question about assessed value to real value or—— [121]

The Court: Gentlemen, I am not the slightest bit interested in assessed value.

(Testimony of Wayne M. Akin.)

Mr. McLane: I was going to ask what the proportion of it was.

The Court: There is a figure in the record compared to his evaluation and there was an assessment figure of a little over \$3,000 for the property which has no relationship to this case at all.

Q. (By Mr. McLane): Mr. Akin, you stated in answer to a question by Judge Fisher that some extraneous factors are considered in determining the fair rental on farm land in the area of Mr. Butler's property and the vicinity around Phoenix. Would you state what some of those extraneous factors are?

A. The capacity of land to produce is very largely influenced by its combination with other land. A large body of land taken together can be handled in a rotation manner that will make all of that land produce a higher production than any small fraction of it can produce by itself and that is particularly true in handling livestock. 160 acres cannot handle livestock effectively. When you got ten times that much land taken together, it all produces a situation in which you got an efficient and profitable enterprise, so that land taken with other land is extremely important in its value to a unit as a whole. [122]

Q. Are there any other factors, extraneous factors, that were existent in February of 1948?

A. Probably the most important single factor is the effect of the way the water is provided. For instance, you can—you have three pumps that

(Testimony of Wayne M. Akin.)

each produce about a little over 3,000 gallons per minute each, or, we will say for the purpose of this illustration, around 9,000 gallons a minute. Now, that water is divided up among all of the fields that are subject to that water right. If you can take that water as a body and use it progressively over a large area, you can get vastly more efficient use out of your water and therefore you can put more land per crop to use and therefore you can make all of that land produce more money per acre.

Then, you got the further factor that you have got this continuous leaching problem and if you are going to leach land, you can't in many instances, you can't leach it and farm it at the same time, so you have got to have certain fractions of your land that you are laying out all the time.

Then, you've got the problem of relevelling and of fitting in your crop rotation so that it becomes very significant as to whether a piece of land, how a piece of land fits into an over-all pattern of a larger enterprise, as to what that particular little piece may be worth to the general operator.

Q. When you refer to the term "critical [123] water area," does that mean that no more wells may be dropped in that area?

A. For the production of new land, for the subjugation of new land.

Q. In other words, you must continue to use whatever wells are in existence, no others?

A. You must continue to farm whatever land is being farmed and no more.

(Testimony of Wayne M. Akin.)

Q. And then, if the water level continues to drop, you are still restricted by the number of wells that are in the area? A. That's right.

Mr. McLane: No further questions.

The Court: Is that all?

Mr. Clark: Just a couple more questions, please.

Recross Examination

Q. (By Mr. Clark): When were you hired by Mr. Haggard to make this appraisal?

A. About three months ago. I don't remember the exact date.

Q. About three months ago? A. Yes.

Q. It was during 1955?

A. I can't remember. It was either late in '54 or early in '55. I just don't remember. [124]

Q. And did you know Mr. Haggard before?

A. Not very well. I knew who he was when I saw him but was not particularly well-acquainted with him.

Q. But you didn't have any business dealings with him before this? A. No, sir.

Mr. Clark: I think that is all.

The Court: All right. Thank you very much, Mr. Akin.

Is this witness excused by both sides?

Mr. McLane: Yes, sir.

Mr. Clark: Yes, sir.

The Court: Very well.

(Witness excused.)

Mr. McLane: The Petitioner rests, your Honor.

Mr. Clark: Respondent rests, your Honor.

Your Honor, may we request permission to withdraw the Respondent's Exhibits and substitute photostats in lieu thereof?

The Court: Yes.

Mr. McLane: And one exhibit introduced by Petitioners.

The Court: I will grant the right generally to substitute appropriate copies for any original papers.

Mr. Clark: Thank you, sir.

Mr. McLane: Your Honor, could we just—I just finished trying a case in Phoenix, I'd like as much time as possible on the briefs, if it is agreeable with the Court. I know this [125] is a familiar plea.

The Court: All right. How much time do you need?

Mr. McLane: I'd like 45 days, your Honor, and then maybe 30 days after Government's brief, before I need file reply brief.

The Court: Well, you want to file simultaneous or seriatim briefs or what?

Mr. Clark: I think simultaneous briefs will be all right.

Mr. McLane: I would prefer to file a brief first and then have the Government file one and then file a reply brief.

The Court: I don't require anybody—if the Government wants simultaneous briefs, if both sides agree, then I am willing to take seriatim briefs,

but I gather Respondent wants simultaneous briefs.

Mr. Clark: Yes, sir.

The Court: Very well. 45 days for the original brief and 30 days for the reply briefs.

Mr. McLane: Thank you, your Honor.

Mr. Clark: Thank you.

The Court: Anything further? All right, I suppose that means we will be recessing until Monday morning at 10 o'clock unless something develops in the meantime.

(Whereupon, at 3:30 o'clock p.m., the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed April 18, 1955.

[Endorsed]: No. 15040. United States Court of Appeals for the Ninth Circuit. D. M. Haggard and Nila Haggard, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: February 20, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15040

D. M. HAGGARD and NILA HAGGARD,
Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITIONERS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Come now petitioners, D. M. Haggard and Nila Haggard, and cite the following points upon which they intend to rely for reversal of the judgment of the Tax Court:

1. The Tax Court erred in determining that the sole issue was whether the \$12,000.00 payment was in fact a payment of rent.

2. The Tax Court erred in holding that where a "lessee" acquires "something of value" in relation to the overall transaction, the "rental" payment does not come within the definition of rent in Section 23 (a)(1)(A) of the Internal Revenue Code of 1939.

3. The Tax Court erred in relying on Breece Veneer & Panel Co., 22 T.C. 1386 (1954), (on appeal C. A. 7th).

4. The Tax Court erred in holding that when rental payments materially exceed the current "fair-rental value" of the property "leased" and where the total payments made prior to the exercise of the option are disproportionate to the relatively small final amount required to acquire title, the "lessee" is building up a substantial equity interest in the property, as intended by the parties, and the payments in reality are being applied on the agreed purchase price of the property.

5. The Tax Court erred in determining that the intention of Mr. Butler and petitioners was to effectuate a sale on February 9, 1948.

6. The Tax Court erred in determining that the value of the 160 acres on February 9, 1948 was not \$21,750.00.

7. The Tax Court erred in determining that the fair rental value of the 160 acres did not exceed \$5,000 for 1948 or 1949.

8. The Tax Court erred in holding that petitioners did not carry their burden of proof with respect to the fair market value of the 160 acres on February 9, 1948.

9. The Tax Court erred in treating as evidence the legal presumption of correctness attaching to the Commissioner's determination.

10. The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

The petitioners designate the entire record as certified by the Tax Court to the Court of Appeals for the Ninth Circuit as necessary for a consideration of the points upon which they intend to rely.

Dated this 17th day of February, 1956.

McLANE & McLANE,
/s/ By NOLA McLANE,
Attorneys for Petitioners

[Endorsed]: Filed February 20, 1956. Paul P. O'Brien, Clerk.

No. 15040

IN THE

UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

D. M. HAGGARD AND NILA HAGGARD,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS

**On Petition for Review of the Decision of
The Tax Court of the United States**

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FILE

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PAUL P. O'BRIEN, CL



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No. 15040

IN THE

UNITED STATES

COURT OF APPEALS

For the Ninth Circuit

D. M. HAGGARD AND NILA HAGGARD,	}
<i>Petitioners,</i>	
VS.	
COMMISSIONER OF INTERNAL REVENUE,	}
<i>Respondent.</i>	

BRIEF FOR PETITIONERS

On Petition for Review of the Decision of

The Tax Court of the United States

OPINION BELOW

The only previous opinion is that of the Tax Court of the United States promulgated September 28, 1955. The findings of fact and opinion of the Tax Court (R. 11-24) are reported at 24 T.C., No. 125.

JURISDICTION

This appeal involves income taxes. By a notice of deficiency, dated July 24, 1953, addressed to Mr. D. M. Haggard and Mrs. Nila Haggard, the Commissioner of Internal Revenue determined a deficiency of \$3,480.96 for the taxable year of 1949 (R. 7). A petition was filed with the Tax Court of the United States on September 14, 1953, under the authority of Section 272 (a) of the Internal Revenue Code of 1939, for a redetermination of the deficiency set forth in the notice of deficiency (R. 5). The decision of the Tax Court was entered on November 9, 1955 (R. 25). Said decision found that there was a deficiency in income tax in the amount of \$3,480.96. A petition for review by this Court was filed by the taxpayers on December 28, 1955 (R. 26). The jurisdiction of this Court to review the aforesaid decision of the Tax Court is founded on Sections 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED

In November of 1945 John Butler and his wife, Hester, purchased 160 acres of farm land in Laveen, Arizona from Clyde Ewalt for \$40,000 (R. 15). The terms of purchase required annual principal payments of \$5,000 plus interest (R. 97, 98). During 1946 the 160 acres was farmed by the Butlers, and a profit of \$4,000 to \$4,800 was earned (R. 15, 85). In 1947, the 160 acres was rented for \$4,000, and a profit of \$3,844 was earned for that year (R. 15). Thus, at the end of two years of ownership, Mr. Butler had made a total profit of from \$7,844 to \$8,644, but had been required to pay the mortgagee two annual principal payments of \$5,000 plus interest or a total of \$10,000 plus interest (R. 15, 16). In short, the farm was not paying for itself from income, and the Butlers were forced to draw on their own reserves to make up the annual deficiencies between earnings and the amount needed for annual mortgage and interest payments. The balance owed to the mortgagee on the 160 acres at the end of 1947 was \$22,000 (R. 100). In addition \$6,500

was owed to the National Farm Loan Association (R. 91). Thus, a total of \$28,500 remained due after the two annual payments of \$5,000 each had been made for 1946 and 1947 (R. 91, 100). Adding the \$28,500 still owing on the 160 acres at the end of 1947 to the total of \$10,000 paid in 1946 and 1947 gives a total sum of \$38,500. Therefore, the down payment made by Mr. Butler when he purchased the 160 acres for \$40,000 in 1945 could not have exceeded \$1,500 despite his testimony that he did not remember what he paid down, but thought it was \$10,000 (R. 97).

At the end of 1947, Mr. Butler found himself in the following situation: He still owed \$28,500 on the 160 acres; the 160 acres did not earn enough annual profit to pay the \$5,000 yearly principal payments due Mr. Ewalt; he had been subjected to heart trouble in 1947 (R. 79, 80); Mr. Ewalt wanted the balance of the purchase price due him as quickly as possible so that he could build an apartment house in San Francisco (R. 16, 98); and his friends (a banker and head of a co-op) were urging him to pay his debts while times were good (R. 98).

It was in this context that Mr. Butler listed the 160 acres for sale with a real estate broker in the latter part of 1947 or early days of 1948 (R. 16). The price asked was \$48,000 (R. 16). Subsequently, at least six prospects responded to the listing (R. 16, 87). However, no sales were consummated because these individuals were interested in trading other property for the 160 acres rather than buying for cash (R. 87). For example, one man wanted to trade in a first mortgage on an apartment house, and another wished to trade in 20 acres, while a third offered a Ford (R. 87)! Finally a man named Talby offered to buy the property for \$8,000 down and the balance in ten equal payments (R. 16, 88).

Nevertheless, Mr. Butler did not accept the offer of Mr. Talby or agree to sell because he wanted to get his money "just as quick" as he could (R. 16, 98, 99). Instead he contacted the

petitioner, D. M. Haggard, whose land adjoined Mr. Butler's on two sides, to determine if Mr. Haggard was interested in the 160 acres (R. 16, 88). Petitioner, D. M. Haggard, told Mr. Butler that he was willing to lease the 160 acres for \$10,000 in 1948 and \$12,000 in 1949, and pay \$2,000 for an option permitting him to elect to buy the acreage in 1950 for \$24,000 (R. 41). Neither the \$2,000 option payment nor the lease payments of \$10,000 and \$12,000 were to apply against or act as a credit on the purchase price of \$24,000 to be paid in 1950 if the option was exercised (Exhibits 1, 2; R. 13). Thereafter, Mr. Butler and Mr. Haggard went to the office of Mr. Haggard's lawyer, J. D. Merrill (R. 42, 75), who prepared the Lease and Option agreements (Exhibits 1, 2) which were executed by Mr. Butler after he agreed to the transaction (R. 96).

About one week after signing the Lease and the Option in Mr. Merrill's office, Mr. Butler took the papers to his own lawyer to see "if it was bona fide," and was advised that "it was all right" (R. 77). Prior to and at the time Mr. Butler consulted his own lawyer about the Lease and Option transactions, his income tax returns had been prepared by a lady who maintained his books and records. Later this individual moved, and in January of 1949 Mr. Butler retained a firm of certified public accountants in Phoenix, Arizona, to prepare his 1948 federal income tax return (R. 77). It was this firm which advised Mr. Butler to report the 1948 transaction as a sale rather than a lease (R. 78). In other words, as Mr. Butler testified: "The tax men fixed it up" (R. 83). Consequently, on Mr. Butler's federal income tax return for 1948, the Haggard rental payment of \$10,000 was not treated as ordinary income (R. 83, 84). Instead the transaction was reported as the sale of a capital asset held for more than six months (R. 83, 84). The gain was computed by adding the cost of a well (\$2,200) to the original cost of the land (\$40,000) for a total adjusted cost basis of \$42,200 which was then subtracted from \$48,000 (\$2,000 option payment plus \$10,000 and \$12,000 of lease payments plus \$24,000 purchase price) (R. 83,

84). One-half of the resultant "gain" of \$5,780 or \$2,890 was reported as income received in 1948 (R. 83, 84). In this way, Mr. Butler avoided paying ordinary income tax on \$10,000 of lease payment for 1948 and \$12,000 of lease payment to be received in 1949.

On the other hand, petitioners deducted the \$12,000 paid to Mr. Butler during 1948 pursuant to the lease agreement under the authority of Section 23 (a) (1) (A) of the 1939 Internal Revenue Code. The Commissioner of Internal Revenue disallowed the \$12,000 deduction "on the ground that the payment was not rental expense within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939" (R. 18). In explaining more specifically the basis of the disallowance, respondent stated at the trial below that:

" . . . The respondent's position is that substance and not mere form should be looked to in order to determine whether there was actually a lease and option or whether the entire transaction comprehended a purchase and sale of the premises on February 9, 1948.

The evidence will show that there was an intent on the part of the parties to this transaction to make a sale and to make a purchase. The so-called rental payments made under this contract, this transaction, would, therefore, actually constitute the purchase price of a capital asset and not the payment in the nature of rent within the meaning of Section 23 (a) of the Code . . ." (R. 37, 38). (Emphasis supplied)

The Tax Court, in its opinion, agreed that the above "substance versus form" statement set forth the only question for decision by saying that:

" . . . The *sole issue* to be decided is whether the so-called 'rental' payment was in fact a payment or rent under the lease and deductible as such, or a partial payment of the purchase price of the property." (R. 18). (Emphasis supplied)

In deciding that sole issue, the Tax Court ruled as follows:

"The most recent consideration of this issue was in Bruce

Veneer & Panel Co., 22 T.C. 1386 (1954) (on appeal C.A.7). There, petitioner entered into a 'Lease' and 'Option to Purchase' agreement with the R.F.C. with respect to certain property, in part of which it was at the time conducting its business. Under the agreement, petitioner was to pay 'as rent' \$100,000 in 60 monthly installments, after which it had the option to purchase the property for \$50,000. The Court held, despite the explicit language of the lease agreement, that since the rental payments materially exceeded the *current fair rental value* of the property, and since the aggregate payments paid prior to the exercise of the option were disproportionate to the relatively small final amount required to obtain title, *petitioner was building up a substantial equity interest in the property, as intended by the parties*, and that the payments, *in reality*, were being applied to the agreed purchase price of the property. We are of the opinion that the rationale there expressed is applicable here. Judson Mills, *supra*; Robert A. Taft, 27 B.T.A. 808, 812 (1933); Holeproof Hosiery Co., 11 B.T.A. 547 (1928)" (R. 19, 20). (Emphasis supplied)

It is the above analysis of the law which gives birth to each of petitioners' assignments of error, and the question presented to this Court.

The question is whether the Tax Court correctly interpreted Section 23 (a) (1) (A) when it held that if rental payments exceed fair rental value of the property and the total of such payments are disproportionate to the final payment required to obtain title, the parties *intended* to and did acquire an equity in the property, and that such rental payments were in reality payments on an agreed purchase price?

SPECIFICATION OF ERRORS RELIED ON

(1) The Tax Court erred in determining that the sole issue was whether the \$12,000.00 payment was in fact a payment of rent.

(2) The Tax Court erred in holding that where a "lessee" acquires "something of value" in relation to the overall transaction, the "rental" payment does not come within the definition

of rent in Section 23 (a) (1) (A) of the Internal Revenue Code of 1939.

(3) The Tax Court erred in relying on *Breece Veneer & Panel Co.*, 1954, 22 T.C. 1386 (on appeal C.A. 7th).

(4) The Tax Court erred in holding that when rental payments materially exceed the current "fair rental value" of the property "leased" and where the total payments made prior to the exercise of the option are disproportionate to the relatively small final amount required to acquire title, the "lessee" is building up a substantial equity interest in the property, as intended by the parties, and the payments in reality are being applied on the agreed purchase price of the property.

(5) The Tax Court erred in finding that the intention of Mr. Butler and petitioners was to effectuate a sale on February 9, 1948.

(6) The Tax Court erred in finding that the value of the 160 acres on February 9, 1948, was not \$21,750.00.

(7) The Tax Court erred in finding that the fair rental value of the 160 acres did not exceed \$5,000 for 1948 and 1949.

(8) The Tax Court erred in its holding that petitioners did not carry their burden of proof with respect to the fair market value of the 160 acres on February 9, 1948.

(9) The Tax Court erred in treating as evidence the legal presumption of correctness attaching to the Commissioner's determination.

(10) The Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law.

ARGUMENT

There are two good reasons why the Tax Court should be reversed in this case. They are *Breece Veneer & Panel Co.*, 7 Cir.,

decided April 26, 1956 (56-1 USTC ¶ 9485 and *Benton v. Commissioner*, 5 Cir., 1952, 197 F. 2d 745.

Each of the above cases interpreted the identical portion of Section 23 (a) (1) (A) of the 1939 Internal Revenue Code involved herein which provides that a taxpayer may deduct from gross income:

“ . . . rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.”

Therefore, it is important to determine why the *Breece* case, *supra*, and the *Benton* case, *supra*, call for the reversal of the Tax Court's decision in the appeal before this Court.

In ruling that petitioners' payment of \$12,000 during 1949 under the Lease agreement was not allowable as a deduction under the above language of Section 23 (a) (1) (A), the Tax Court rested its decision on the rationale expressed in *Breece Veneer & Panel Co.*, 1954, 22 T.C. 1386. After setting forth its rule, announced in the *Breece* case, *supra*, the Tax Court decided against these petitioners saying:

“ . . . We are of the opinion that the rationale there expressed is applicable here.”

However, the Tax Court's decision in *Breece Veneer & Panel Co.*, 1954, 22 T.C. 1386, was reversed by the U.S. Court of Appeals for the Seventh Circuit on April 26, 1956.

The opinion of the Seventh Circuit in that case, citing *Helvering v. San Joaquin Fruit and Investment Co.*, 1936, 297 U.S. 496, 56 S.Ct. 569, held that there was no equity until the option was exercised. Applying that view to the facts of this case, it is clear that the \$12,000 lease payment made during 1949 was a proper deduction under Section 23 (a) (1) (A) because the petitioners did not exercise the option involved in this case until January of 1950.

Furthermore, not only did the Tax Court err in resting its

decision on its earlier opinion in *Breece Veneer & Panel Co.*, 1954, 22 T.C. 1386, which was later reversed in 7 Cir., decided April 26, 1956 (56-1 USTC ¶9485) but its decision in this case also contravened *Benton v. Commissioner*, 5 Cir., 1952, 197 F. 2d 745.

When the Tax Court applied the above quoted language of Section 23(a)(1)(A) to the facts of this case, its opinion concluded that the "*sole issue* to be decided is whether the so-called 'rental' payment was in fact a payment of rent under the lease and deductible as such, or a partial payment of the purchase price of the property." In other words, the Tax Court viewed the problem, as did respondent, simply as a matter of looking to "substance and not mere form" to determine if there was a sale of the premises on February 9, 1948. On this issue, which the Tax Court itself said was the sole issue, petitioners should prevail.

This same problem was before the U. S. Court of Appeals for the Fifth Circuit in *Benton v. Commissioner*, 5 Cir., 1952, 197 F. 2d 745, 752, wherein the Court said that the question is whether "what was in form a lease was in substance and according to the real intention of the parties a conditional sale contract." U. S. Circuit Judge Rives, writing for the Court, held at page 752 that:

"If the parties in good faith actually intended to enter into a lease contract, then the taxpayer, up until the time that he exercised his option to purchase, acquired no title to or equity in the property." (Emphasis supplied)

In emphasizing that it was the intention of the parties that controlled, Judge Rives stated that for the Tax Court to decide by application of an objective economic test that a taxpayer had an equity in the property effectively begs the question to be decided, namely whether the parties intended a lease or a conditional sale contract.

But this is not the rule applied by the Tax Court in this case. Instead it held that:

"The most recent consideration of this issue was in Bruce

Veneer & Panel Co., 22 T.C. 1386 (1954) (on appeal C. A. 7) . . . The Court held, despite the explicit language of the lease agreement, that since the 'rental' payments materially exceeded the current *fair rental value* of the property, and since the aggregate payments paid prior to exercise of the option were disproportionate to the relatively small final amount required to acquire title, petitioner was building up a substantial equity interest in the property, *as intended by the parties*, and that the payments, in reality, were being applied to the agreed purchase price of the property. We are of the opinion that the rationale there expressed is applicable here." (R. 19, 20). (Emphasis supplied)

Petitioners ask the Court to notice that the Tax Court's rule in this case has again determined the intent of the parties by applying an objective economic test. It says that if the payments materially exceed a current *fair rental value* and the total payments paid before the option is exercised were disproportionate to the relatively *small final amount* paid to acquire title, petitioner is obtaining an equity interest *as intended by the parties* and the payments are in reality applied to an agreed purchase price. Under this view, the intent of the parties depends on fair rental value and the size of a payment made to acquire title. In short, the Tax Court finds that the parties intended a conditional sale if these two economic tests are met. Thus, the intention of the parties is merely supplemental to economic "facts" alone.

Such an approach by the Tax Court contravenes both the substance and the spirit of the rule of *Benton v. Commissioner, supra*. As the Court said on page 752 "there being here involved no restraint by law or public policy, the parties had full liberty to contract as they pleased" citing as authority *Hervey v. R. I. Locomotive Works*, 1877, 93 U.S. 664, 672, 23 L. Ed. 1003; *Helvering v. Lazarus & Co.*, 1939, 308 U.S. 252, 255, 60 St. Ct. 209, 84 L. Ed. 226; *Bankers Mortgage Co. v. Commissioner*, 5 Cir., 1944, 141 F. 2d 357; *Hogan v. Commissioner*, 5 Cir., 1944, 141 F. 2d 92, 93; *West v. Commissioner*, 5 Cir., 1945, 150 F. 2d 723.

Consequently, the situation before this Court is the same as that presented to the U.S. Court of Appeals for the Fifth Circuit in *Benton v. Commissioner, supra*. Just as the Fifth Circuit stated in that case, the inference or conclusion that the parties intended a sale on February 9, 1948, is naturally weakened when it is based upon objective economic tests, and is merely supplemental to economic facts alone. Thus, the Court of Appeals there held that it should review the inferences and conclusions as to the intention of the parties, correctly pointing out that the errors complained of were concerned with the inferences and conclusions which it could review. When taking such a step, the following factors are offered for this Court's consideration.

The very best evidence of a man's intention are the written documents to which he signs his name under oath. Many reasons arise why laymen taxpayers subsequently conclude that they did not "intend" the legal conclusion which resulted from documents executed by them after consultation with an attorney. For instance, Mr. Butler signed a document clearly designated a Lease in which he agreed to let the subject 160 acres to petitioners, and acknowledged before a notary public that he executed the Lease for the purposes therein stated (Exhibit 2). One week later he took the Lease to a lawyer of his own choosing to see if it was "bona fide," and was advised that it was all right. However, when the time came to file a Federal income tax return for 1948, a firm of certified public accountants advised him to report the transaction as a sale, and he reported only one-half of the gain (R. 17, 83, 84) or \$2,890. Subsequently Mr. Butler "wrangled" with a U.S. Internal Revenue Agent, and told his bookkeeper to treat the payment as rent and pay the additional tax (R. 78). Furthermore, in April of 1949, nearly fourteen months after Mr. Butler "sold" the 160 acres, he mortgaged the land for \$12,000 after obtaining a subordination agreement from petitioners in which they agreed that their option would be subordinate to a mortgage on the property (R. 17). In explaining the initial transaction to the trial judge in 1955, Mr. Butler testified that while he did

not know who suggested it or why the instruments were drawn in the form of a Lease and an Option, he did agree "to it at that time that way" (R. 96).

The above factors certainly indicate an individual who knew that he was leasing 160 acres of farm land on February 9, 1948, and was granting the lessee a separate option to purchase for a purchase price of \$24,000. Nevertheless, the Tax Court's opinion mentions other considerations which it is said support a conclusion that there was an intention by Mr. Butler that he was selling the property on that date. First, the Tax Court found that Mr. Butler had, at the time of the transaction with petitioners, an offer of "purchase" from the Talby group of \$48,000. However, Mr. Butler refused this offer because the purchase price was to be paid \$8,000 down and the balance in ten equal installments, and he wanted to get the money out as quick as he could (R. 98, 99). Therefore, when he entered into a Lease and an Option with petitioners, Mr. Butler deliberately and consciously chose to lease for two years for \$22,000 and grant an option to buy for \$24,000. If he had intended a "sale," all Mr. Butler had to do was go ahead and "sell" to the Talby group. In this regard the Tax Court notes that Mr. Butler would not have considered making an outright sale for \$24,000 on February 9, 1948. The fact is that he was quite anxious to do so as long as the 160 acres could be leased for two years for \$22,000 before the 160 acres was sold. Again it is economics that are being relied upon to determine if the "parties in good faith actually intended to enter into a lease contract." *Benton v. Commissioner, supra*. Possibly Mr. Butler would not have agreed to sell the 160 acres on February 9, 1948, but how does that bear on the question of whether he actually intended to lease the property for two years for \$22,000 on February 9, 1948, and subsequently sell for \$24,000 to petitioners? One who buys a horse for \$40 may not sell Dobbin for \$24, but at the same time be quite willing to lease the horse for two years for \$22 and then sell for \$24.

In reaching its decision in this matter, petitioners wish to emphasize to the Court the thought expressed in *Benton v. Commissioner*, *supra*, at 753, by U.S. Circuit Judge Rives who said:

"Within the limits of reason, the parties had a right to exercise their own judgment, and that of the Commissioner or of the Tax Court cannot be substituted therefor."

CONCLUSION

The decision of the Tax Court in the instant case is erroneous and should be reversed.

Dated: Phoenix, Arizona
June 1, 1956

Respectfully submitted,

W. LEE MCLANE, JR.
NOLA MCLANE
Counsel for Petitioners

MCLANE & MCLANE
Of Counsel



IN THE
United States Court of Appeals
For the Ninth Circuit

D. M. HAGGARD AND NILA HAGGARD, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for Review of the Decision of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

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IN THE
**United States Court of Appeals
For the Ninth Circuit**

No. 15040

D. M. HAGGARD AND NILA HAGGARD, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petition for Review of the Decision of the Tax Court
of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 11-24) are reported at 24 T.C. 1124.

JURISDICTION

This petition for review (R. 26-30) involves income taxes for the calendar year 1949. On July 24, 1953, the Commissioner of Internal Revenue mailed to the

taxpayers a notice of deficiency in the amount of \$3,480.96. (R. 7-10.) On September 14, 1953 (R. 3), taxpayers filed a timely petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939 (R. 5-7). The decision of the Tax Court sustaining a deficiency of \$3,480.96 was entered on November 9, 1955. (R. 25.) The case is brought to this Court by petition for review filed December 28, 1955. (R. 30.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

The taxpayers, as lessees, simultaneously executed self-styled "Lease" and "Option" agreements under which they "rented" farm property for \$10,000 in 1948, and \$12,000 in 1949 and had, for \$2,000 consideration, an option, which was duly exercised, to purchase the property at the expiration of the lease for an additional \$24,000. The property had a fair market value of \$48,000.

The question presented is whether the Tax Court was clearly erroneous in its determinations that the taxpayers were not paying rent for the use of the property which would be deductible under the 1939 Code, Section 23 (a)(1)(A), but that the annual "rental" payments were non-deductible since they were intending to and did permit the taxpayers to acquire an equity in the property.

STATUTE INVOLVED

Internal Revenue Code of 1939:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or business expenses*.—

(A) *In General*.—* * * rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

STATEMENT

The facts, as found by the Tax Court and presented in the record, may be summarized as follows:

D. M. Haggard (hereinafter referred to as taxpayer) and Nila Haggard, husband and wife, operate a ranch in Maricopa County, Laveen, Arizona, comprising, in early 1948, approximately 1,340 acres. On February 9, 1948, taxpayer, as “lessee,” simultaneously entered into “Lease” and “Option” agreements with Mr. John Butler, as “lessor,” involving 160 acres adjacent to taxpayer’s property. It is the effect of these “Lease” and “Option” agreements, and, in particular, the deductibility of the 1949 “rental” payment of \$12,000 made thereunder, which is in issue. (R. 12-13.)

The property in question was originally purchased by Mr. Butler in November, 1945, for a price of \$40,000 (\$10,000 down and the balance in annual installments of \$5,000). During 1946, Mr. Butler farmed the entire 160 acres, earning a profit of between \$25 to \$30 per acre, or \$4,000 to \$4,800 for the year. In 1947, Mr. Butler leased the 160 acres for one year for \$4,000. Mr. Butler testified (R. 85) that he leased this land to a Mr. Strom, who had been a farmer in that area since at least 1934. Since Mr. Butler was required to pay assessments and taxes under this arrangement, in the amount of \$156, his net profit for 1947 in respect to the 160 acres was approximately \$3,844, which amount was less than the annual payment of \$5,000 plus interest which was due on his purchase agreement. Thus, at the end of 1947, Mr. Butler had made a total profit of from \$7,844 to \$8,644 for the two years he owned the property and had paid the mortgagee \$10,000 plus interest for the same period. (R. 15-16.)

In late 1947, or early 1948, Mr. Butler was being pressed by his mortgagee to meet an overdue payment on the purchase price of the property. (R. 16.) He testified that he was also advised by friends (a banker and head of a co-operative) to the effect that "If you owe any money, you better get yourself into shape because this thing is going * * *." (R. 98.) Accordingly, Mr. Butler listed the property for sale with a realtor at \$48,000. A number of prospective purchasers responded to this listing, but none made a suitable offer until the first week in February 1948. About February 2, 1948, one week before the lease and option agreements in question were executed, Mr. Butler was

offered \$48,000 for the property by the son and son-in-law of one Talby, terms being \$8,000 down and the balance in 10 equal installments. (R. 16.)

Before accepting this offer, Mr. Butler, realizing taxpayer owned property on both sides of the acreage involved, decided to offer the land to him. In the event he was not interested, Mr. Butler intended to accept the Talby offer. (R. 16.) The testimony shows that on February 9, 1948, Mr. Butler met with taxpayer and offered to sell the land to him for \$48,000. (R. 65, 80, 95.) After some discussion, they went together to the office of taxpayer's attorney. (R. 13.) Mr. Butler testified that he agreed to the suggestion of the attorney (R. 95-96) that the transaction be handled by the execution of a "lease," under which taxpayer would rent the property for the balance of 1948 for \$10,000, and \$12,000 for 1949, with an "Option," for a separate consideration of \$2,000, under which taxpayer would have the right to purchase the 160 acres after January 1, 1950, and before January 10, 1950, for \$24,000. (R. 13.) The parties then left the attorney's office, but Mr. Butler, before signing, was concerned about the possible tax consequences of the proposed arrangement and revisited taxpayer's attorney to question this aspect of the transaction. He was assured the entire transaction was properly reportable for tax purposes as a sale. (R. 13.) Later the same day, February 9, 1948, the parties returned to the attorney's office and simultaneously executed the "Lease" and "Option" agreements (R. 13), the pertinent provisions of which are set forth in the Tax Court findings of fact (R. 14-15). At the time the deal was consummated, Mr.

Butler testified that it was his intent to sell the property. (R. 89, 95-96.)

On the same day the agreements were executed, taxpayer paid Mr. Butler the \$10,000 "rental" payment for 1948 and the \$2,000 consideration for the "Option." (R. 13, 16.) On January 1, 1949, taxpayer paid Mr. Butler the other \$12,000 "rental" payment, which amount is in controversy. (R. 16.) The fair or reasonable rental for the property in 1947 would have been \$3,000 to \$4,000 and in February, 1948, the rental that could reasonably have been expected would have been about \$5,000 per year. (R. 17.) Taxpayer testified that during 1949, the year in question, he had only 90 of the 160 acres in crops. (R. 62.)

On April 1, 1949, Mr. Butler borrowed \$12,000 from the Valley National Bank of Phoenix and mortgaged the property in question as collateral. On the same day, taxpayer, as optionee, executed a "subordination agreement," subordinating his option to this mortgage. The money received on this mortgage was used by Mr. Butler to pay the original mortgage indebtedness on the property. (R. 17.)

In January, 1950, taxpayer exercised his "Option" by assuming the \$12,000 debt of Mr. Butler to the Valley National Bank and paying Mr. Butler the additional \$12,000 due on the \$24,000 option price. On January 20, 1950, a warranty deed was issued by Butler conveying title to the property to the taxpayer. (R. 17.)

Following the execution of the "Lease" and "Option" agreements, Mr. Butler retained a firm of certified public accountants to prepare his 1948 federal

income tax return and was advised to report the transaction as a sale; Mr. Butler so treated the transaction on his 1948 tax return. Taxpayer treated the \$12,000 payment made on January 1, 1949, as rental expense and deducted this amount in computing his 1949 tax. (R. 17-18). The Commissioner of Internal Revenue determined that this payment constituted an installment on the purchase price of the property and was not deductible under Section 23 (a)(1)(A) of the Internal Revenue Code of 1939. (R. 18.)

SUMMARY OF ARGUMENT

Under Section 23 (a)(1)(A) of the Internal Revenue Code of 1939, if taxpayer, by means of payments, is either taking title to, or acquiring an equity in, the property involved, he is not entitled to deduct such payments as rent, regardless of what the parties have called the payments. Whether a taxpayer is paying rent for the mere possession of property or is making an investment in the property is a question of the intention of the parties and is therefore one of fact and should not be disturbed unless clearly erroneous. Furthermore, it is a question which cannot be determined unilaterally and taxpayer has the burden of proving the genuineness of both his and the other party's intent in order to prove that he is not within either of the statutory negatives.

In this case, the Tax Court correctly looked to the evidence as a whole in determining the intention of the parties. There was ample evidence to support the Tax Court's finding that both the parties intended, and taxpayer in fact did, acquire a substantial equity

by means of the "rental" payments. Thus, the Tax Court's finding cannot be said to be clearly erroneous and its decision denying deduction for the payments in question should be affirmed.

ARGUMENT

The Record Supports the Conclusion of the Tax Court That the Payment in Question Is Not Deductible as "Rental" Expense Under Section 23 (a)(1)(A) of the Internal Revenue Code of 1939

The statute in question provides for the deduction from gross income, as a business expense, of rentals required to be paid as a condition to the continued use or possession of property "to which the taxpayer * * * is not taking title or in which he has no equity." These provisions relating to the taking of title or acquiring of an equity are stated in the alternative and the deduction cannot be availed of if the "lessee" has brought himself into either category prohibited by the statute. *Oesterreich v. Commissioner*, 226 F. 2d 798 (C.A. 9th). Whether, under a particular instrument or agreement, the taxpayer has brought himself into either category is determined by the intention of the parties to the instrument and the courts will look to this intent to determine whether what is in form a lease is in effect a contract for sale. *Oesterreich v. Commissioner, supra*; *Benton v. Commissioner*, 197 F. 2d 745 (C.A. 5th); *Watson v. Commissioner*, 62 F. 2d 35 (C.A. 9th); *Jefferson Gas Coal Co. v. Commissioner*, 52 F. 2d 120 (C.A. 3d); *Lodbszeiski v. Commissioner*, decided October 6, 1944 (1944 P-H T.C. Memorandum Decisions, par. 44,326). In this respect, this Court has

recently stated in *Oesterreich v. Commissioner* (pp. 801-802):

It seems well settled that calling such a transaction a "lease" does not make it such, if in fact it is something else. *Judson Mills*, 1948, 11 T.C. 25; *Robert A. Taft*, 1938, 27 B.T.A. 808. To determine just what it is the courts will look to see what the parties intended it to be. *Benton v. Commissioner*, 5 Cir., 1952, 197 F. 2d 745. * * * the test should not be what the parties call the transaction nor even what they may mistakenly believe to be the name of such transaction. What the parties believe the legal effect of such transaction to be should be the criterion. If the parties enter into a transaction which they honestly believe to be a lease but which in actuality has all the elements of a contract of sale, it is a contract of sale and not a lease no matter what they call it nor how they treat it on their books. We must look, therefore, to the intent of the parties in terms of what they intended to happen.

This question of intent is clearly factual and findings and inferences of fact made by the Tax Court will not be disturbed unless clearly erroneous. *Pacific Homes v. United States*, 230 F. 2d 755 (C.A. 9th); *Ward v. Commissioner*, 224 F. 2d 547 (C.A. 9th); *Benton v. Commissioner*, *supra*, and cases cited therein. Furthermore, the intention of the parties cannot be determined unilaterally. *Breece Veneer & Panel Co. v. Commissioner*, 232 F. 2d 319 (C.A. 7th).

Thus, the burden rested upon the taxpayer to prove that the payments were consideration only for the use of the property, and that he was not taking title

nor was he acquiring an equity by means of his payments under the lease in question. To so prove that he was not within either of these statutory categories, the taxpayer bore the burden of proving that it was both his intent, and the intent of the other party to the transaction, that the legal effect thereof was a lease rather than a contract of sale or other device by which taxpayer was taking title or acquiring an equity. The Tax Court found as a fact that the taxpayer, through the annual rental payments, was acquiring a substantial equity and that it was so intended by the parties. (R. 24.) It is respectfully submitted that the evidence amply supports this conclusion.

The taxpayer, placing conclusive reliance on the technical words of the instruments which the parties used, insists that the parties *intended* a lease of the property for the period of almost two years because they called it a lease and insists that the taxpayer paid nothing but rent in the total amount of \$22,000, which he must be allowed to deduct in his tax return, because they called it rent. The taxpayer, of course, must equally insist that the property was purchased by him for \$24,000, pursuant to the option (for which he paid \$2,000) because the option agreement so states.

This argument, of course, is in flat contradiction to the *Oesterreich* case, *supra*. What the parties call the transactions is unimportant. Even more significant is the teaching of *Oesterreich* that even if the parties (p. 801) "honestly believe" the transactions to be a lease, it will be treated as a contract of sale if "in actuality" it "has all the elements of a contract of sale * * *."

In the present case, it is inconceivable that the taxpayer could have honestly believed that he was renting property having a total value of \$48,000 (and which he had an option to purchase for \$24,000) by paying a rental of \$22,000 for a period of less than two years. (See the taxpayer's answers to the questions propounded by the Tax Court Judge, R. 65-69.) And it is equally inconceivable that the taxpayer could have honestly believed that he was, by paying \$2,000 for the option, to become entitled to purchase such property for the small purchase price of \$24,000.

However, it is a matter of indifference what the taxpayer did or did not believe. As *Oesterreich* demonstrates, the important consideration is what the parties (p. 802) "intended to happen."

It is obvious that, by the \$22,000 payments denominated as rent plus the \$2,000 payment for the option, the parties intended that the taxpayer would become entitled to have full ownership of the property by the payment of an additional \$24,000 at the end of a period of less than two years. Since the property was worth considerably more, it would be captious to assume that the vendor would have bound himself to sell at such a low price if the \$2,000 option had been the only consideration. Quite plainly, it was the so-called rental payments totalling \$22,000 plus the \$2,000 option payment which formed the consideration enabling the taxpayer to complete the sale for only \$24,000. The taxpayer, by means of these payments, acquired a real and substantial equity in the property—an equity which made it imperative that he exercise the option so long as the value of the property did not fall below \$24,000.

Code Section 23 (a)(1)(A) *supra*, permits a deduction only for payments made for the use of property; payments made to acquire an interest in property are capital expenditures which are expressly made non-deductible. The payments here were correctly held by the Tax Court to come within the latter category.

A more detailed examination of the record will demonstrate that the Tax Court's decision rests on solid grounds. The intention of the taxpayer and Mr. Butler to effectuate a purchase and sale of the farm property, and for the taxpayer to acquire an equity therein, is established by the facts and circumstances surrounding the execution of the agreements on February 9, 1948, and by the very terms of the agreements. This intent was to be carried out by means of simultaneously executed lease and option agreements, under which taxpayer was to pay \$10,000 "rental" in 1948, \$12,000 "rental" in 1949, \$2,000 consideration for the option on February 9, 1948, and \$24,000 under the option in January 1950. (R. 13.) This total of \$48,000 was equal to the amount which Mr. Butler sought as a seller of the property (R. 16, 87), had been offered by a prospective purchaser one week prior to these agreements (R. 16, 87-89), and which was found by the Tax Court to approximate the fair value of the land (R. 23). Confronted with such a situation wherein the concept of sale at first glance pervades the entire transaction, there is little doubt that additional inquiry into the substance and legal effect of the agreement, as shown by the intent of the parties, is necessary to determine the deductibility of the rental payment under the statute involved. See *Watson v. Commissioner, supra*,

p. 36; see also *Berry v. Commissioner*, decided April 3, 1952 (1952 P-H T.C. Memorandum Decisions, par. 52,093).

In this respect, the record amply supports an affirmative finding that it was Mr. Butler's belief and intention, on February 9, 1948, that the legal effect of the transaction was a sale. Mr. Butler bought the farm in 1945 for \$40,000 and, under the financing arrangements in respect to that purchase, assumed a burden of annual payments of \$5,000, plus interest. (R. 15, 97.) His efforts to farm the land in 1946, and his leasing of the property to another farmer in 1947, resulted in a loss in each of those two years. (R. 15, 85.) With this background, coupled with the advice of business friends (R. 98), in late 1947 or early 1948, Mr. Butler desired to sell the property and manifested this intent by listing the property for sale with a real estate agent for \$48,000. Several prospects contacted Mr. Butler in respect to the property and on February 2, 1948, he received an offer to purchase the property for \$48,000 (\$8,000 down and the balance in 10 installments); Mr. Butler intended to accept this offer in the event a better deal could not be made with the taxpayer. (R. 16, 87-89.) Thus, it may be seen that the entire background and course of conduct of Mr. Butler until February 9, 1948 was consistent with a finding that he intended to sell the property involved.

Turning to the date the agreements were executed, it is also clear that this continued to be the intent of Mr. Butler in spite of the form the transaction eventually assumed. Realizing that taxpayer had land

on both sides of the property in question, on February 9th Mr. Butler contacted taxpayer and offered to sell the property to him for \$48,000. (R. 65, 80, 95.) At taxpayer's suggestion, they together went to the office of taxpayer's attorney and it was there that the transaction was executed. (R. 13, 42, 76.) At the exact time the deal was consummated, it was the intent of Mr. Butler to sell the property to the taxpayer. Mr. Butler, the taxpayer's own witness, offered the following uncontradicted testimony (R. 89-90):

Q. (By Mr. Clark): Did you intend to sell this property when you consummated this deal with Mr. Haggard? A. Yes.

* * * *

Q. Can you explain to the Court why it was that these instruments were drawn up the way they were rather than as a straight purchase agreement?

A. Well, sir, I don't know myself, in other words.

Further testimony was as follows (R. 95-96):

The Court: Mr. Butler, I think you testified that when you got together with Mr. Haggard on the morning when these papers were drawn up, that it was your idea to sell this property for \$48,000.

The Witness: Yes.

The Court: Is that what you testified to? Between the time you were in the coffee shop together and the time you got to Mr. Merrill's office, were you and Mr. Haggard continuously together?

The Witness: Until we went up to the office, yes.

The Court: Can you tell me why or wherefore or just what happened, if you know, as to how this got changed over from a \$48,000 sale to a lease for

\$10,000 for a little less than the entire year '48, \$12,000, '49, \$2,000 option and \$24,000 purchase price? What happened, if you remember, that moved it from one to the other?

The Witness: I discussed it, they discussed it.

The Court: Who discussed it?

The Witness: Mr. Merrill, Mr. Haggard, and myself, and they agreed and I agreed to it at that time that way.

The Court: Well, who suggested it, do you know?

The Witness: I don't remember.

The Court: Did you suggest it?

The Witness: No, sir.

The proposition that Mr. Butler intended the legal effect of this transaction to be a sale is bolstered by his concern and actions in respect to the tax consequences involved. After initially meeting with taxpayer and his attorney, Mr. Butler returned to the attorney's office to question this aspect of the deal. Mr. Butler's testimony is as follows (R. 76):

[Q.] From the time you met Mr. Haggard in the coffee shop of the Hotel Adams until the time the lease, excuse me, the document entitled "lease" and the document entitled "Option" were executed in Mr. Merrill's office, did you consult with any lawyer, tax accountant, or tax attorney?

A. I went back to Mr. Merrill's office during the noon hour and consulted him about it and he tried to explain to me and he called up some tax man, I don't know who he was, I don't remember the name, but he talked to him over the phone and he turned around to me and said I'd just go ahead and report it as a sale, so that's what I did.

Mr. Butler further testified (R. 82):

Q. And you testified that you left the office and then returned, is that correct?

A. Yes, sir. In other words, it kind of bothered me. I didn't know how it was going to affect my income tax and then I went back up there to get a little information on it and he convinced me, in other words, it was more or less all right, so I went ahead and went on home and got my wife and we come back and signed it, and then next year we reported it as a sale, as a sale in other words.

Q. Did you question the form of the documents?

A. No sir, I didn't because I am not a lawyer and, in other words, I just took the man's word for it.

Furthermore, this intent to sell at this time was corroborated by Mr. Butler's treatment of the transaction as a sale on his 1948 income tax return. (R. 83.) See *Benton v. Commissioner*, *supra*, p. 751; see also *McWaters v. Commissioner*, decided June 15, 1950 (1950 P-H T.C. Memorandum Decisions, par. 50,152). Taxpayer clearly did not meet his burden of proving it was Mr. Butler's intent that the legal effect of the transaction was to be a lease. On the contrary, through the testimony of taxpayer's own witness, Mr. Butler, there seems to be ample evidence to support an affirmative inference that Mr. Butler's intent at all times was to effectuate a sale and thereby create an equity in the taxpayer. The background desire and efforts to sell, the events on February 9, 1948 (when Mr. Butler offered to sell to taxpayer and at the suggestion of taxpayer and his attorney the transaction took the form of a lease and option), and Mr. Butler's own

statements of intent in respect to all phases of the transaction prior, during and subsequent to the execution of the documents are all consistent with such a finding. It should be further noted that such a finding may be entirely based on facts other than purely objective economic tests.

Taxpayer presents several facts which are submitted as evidentiary of Mr. Butler's intent to lease the property. (Br. 11-12.) However, the bare fact that he signed a document called a lease is certainly in no way controlling; it is the very problem presented in this type of case to pierce such formal manifestations of intent to reach the substance of the situation. *Oesterreich v. Commissioner, supra*; *Watson v. Commissioner, supra*. Mr. Butler's testimony in respect to his visit to a lawyer one week later certainly lends little to detract from a finding that it was his intent to legally effect a sale by the means suggested by taxpayer and his attorney. (R. 76-77.) Likewise, the reference to subsequent dealings with an Internal Revenue agent (Br. 11) seems a strained interpretation of what actually transpired (R. 78-79) and corroborates little except the fact that Mr. Butler was a none too erudite businessman.¹ Furthermore, there is noth-

¹ Q. Did you ever tell an Internal Revenue agent by the name of Mr. Ritchie that you wanted to pay some \$800 or \$900 in tax and treat the Haggard payment as rent?

A. We wrangled, I think. It is years ago, last summer, and I think '48, in other words, I don't think I would have had to pay any tax. I didn't pay—I don't think, then, right along there, and I asked my bookkeeper, I says, "How much would it cost me to pay that '49?" See? And he told me about \$900, and I told him, "Let's pay it," and I went away and never seen him for a couple of weeks and, finally, maybe quite a little while after, then he

ing inconsistent in the fact that Mr. Butler subsequently mortgaged the property and the fact that it was the intent of the parties that taxpayer was to acquire an equity therein or commence taking title. It is clear that Mr. Butler still held legal title at that time and had a mortgageable equity in the property; it is merely the contention of the Commissioner that taxpayer was then in the process of taking title or acquiring an equity therein (which is sufficient to deny the deduction under the statute) and this certainly left Mr. Butler with some interest of value to a mortgagee, especially since the mortgagee here obtained a subordination agreement from the existing optionee. (R. 17.)

Turning to the intent of the taxpayer, it would seem that he relies principally upon the presentation of the lease itself as evidence thereof. (R. 39.) Contrasted with this are several economic factors which are decidedly relevant and which taxpayer has been unable to explain away. Foremost is the finding of the Tax Court that the fair rental value of the property in 1948 was \$3,000 to \$4,000, and in 1949 was \$5,000 (R. 17), yet taxpayer paid "rentals" of \$10,000 and \$12,000, respectively, in these two years. The Tax Court, in view of Mr. Butler's earnings from the farm in 1946, rental to an experienced farmer in 1947 for \$4,000 (R. 15) and the testimony of taxpayer's own expert appraiser (R. 130-134), had ample support for such a finding. The fact that taxpayer paid rentals

came out to my place to pick up a couple of watermelon and he says, "We won that case. It is all settled." And that is the way I left it. I told him if that is what it takes, I'll pay it.

Q. In other words, that offer was refused?

A. Well, I don't know whatever happened to it, but, anyway, they told me it was all cleared.

far in excess of the fair market value is of probative value in determining that he intended, and in fact did, acquire an equity in the property by means of these payments. See *Breece Veneer & Panel Co. v. Commissioner*, *supra*, pp. 322, 323; see also *Benton v. Commissioner*, *supra*; *McWaters v. Commissioner*, *supra*. To counter the inference thus created, taxpayer attempted to show by means of his testimony and exhibit in the form of another lease (R. 46-51) that such rentals were not unusual for him. In view of the remoteness of this other transaction (1955) and the lack of proof of comparability of quality of land, either by taxpayer or his expert, the Tax Court rightfully gave this evidence no weight as to the question of fair rental value, but considered it as to the genuineness of the lease in question. (R. 49.) Taxpayer could also offer only poorly supported reasons why he paid \$22,000 to rent the land for two years (plus an option consideration of \$2,000) which he, through his expert, himself contended was worth only \$21,750 in 1948 and supposedly could be purchased for \$24,000. (R. 65-69, 110.) Taxpayer's reasons for only renting, i.e., requiring the land to fulfill a grain contract in 1948 and to allow use of certain other lands in 1949 (R. 44) and his lack of capital and borrowing ability in 1948 (R. 65-69), were far from persuasive. Bare statements and conclusions not supported by sufficiently detailed information are not acceptable. *Birnbaum v. Commissioner*, 117 F. 2d 395, 396 (C.A. 7th). The payment of such an excess over the fair and reasonable rental value is even more striking in view of the fact that taxpayer utilized only 90 of the 160 acres for

crops in 1949. (R. 62.) Another significant factor in analyzing the true nature of the rental payments is the Tax Court's finding that the rental payments of \$22,000 are about 46 percent of the total considerations of \$48,000 passing from taxpayer to Mr. Butler (R. 24), which figure it also found to be the fair value of the land in 1948 (R. 23). *Watson v. Commissioner, supra*; *In re Rainey*, 31 F. 2d 197, 199 (Md.), *Bowen v. Commissioner*, 12 T.C. 446. In *Watson v. Commissioner*, this Court stated (62 F. 2d, p. 36):

It is unthinkable that the payment of \$47,000, which is about 43 per cent. of the entire consideration, upon property valued at \$109,900 is an annual rental, for that is the approximate amount received by the "lessor" during the year 1924.

At this point, it might be commented upon that the Tax Court was certainly not clearly erroneous in its finding that the taxpayer had not met his burden in respect to the value of the property in 1948 and that the value was approximately \$48,000. (R. 23.) In view of Mr. Butler's purchase price in 1945 of \$40,000 (R. 21, 97), his prior listing at \$48,000 (R. 21, 87) and the factor that taxpayer's expert ignored certain valuable water rights in his appraisal (R. 22, 135-137), the Tax Court's finding in this respect seems quite reasonable. The taxpayer's testimony in regards to amounts he paid for other surrounding acreage (R. 52-54) was not supported by any particular proof or expert appraisal and could properly be disregarded. *Birnbaum v. Commissioner, supra*. Also, taxpayer at the time he entered into the transaction was fully

aware of the tax consequences of the transaction. (R. 69.) The Commissioner contends that this is of some evidentiary value in showing an intent to utilize the device of a lease and option to effectuate a purchase, and yet gain an immediate tax deduction in respect to property which was otherwise not even depreciable. See *Benton v. Commissioner, supra*, p. 753. In view of the foregoing, it is respectfully submitted that taxpayer did not meet his burden of proving that it was not his intent, nor was he not in fact taking title to, or acquiring an equity in, the property by means of rental payments. The taxpayer must prove the statutory negatives. *Oesterreich v. Commissioner, supra*; *Helser Machine & Marine Works, Inc. v. Commissioner*, 39 B.T.A. 644.

Taxpayer relies principally on *Breece Veneer & Panel Co. v. Commissioner, supra*, and *Benton v. Commissioner, supra*, in seeking reversal of the decisions below. (Br. 7-9.)

Taxpayer contends that the Tax Court contravened *Benton v. Commissioner, supra*, by basing its conclusion upon objective economic tests and determining the intent of the parties by an application of such tests. (Br. 8-11.) However, the court in the *Benton* case in no way repudiated the use of economic factors in determining the intent of the parties in such a situation. Rather, the court held (p. 752) that the error there was "In undertaking to apply a *purely* objective economic test" (emphasis added) and "The economic relation of the value of the property to the option price was only one factor to be considered in determining intent." In *Breece Veneer & Panel Co.*

v. *Commissioner*, upon which taxpayer relies, the court stated (p. 323) "However, the *Benton* case held that the economic test in itself is only one of the factors to be considered to determine the intention of the parties."² Furthermore, it would seem that in particular the comparison of rents paid with the fair rental value of the property, as made by the court below (R. 20, 21), is a relevant test in view of the two decisions relied upon by the taxpayer, wherein the respective courts discuss the relationship of the rents paid and the fair rental value. See *Benton v. Commissioner*, *supra*, p. 753; *Breece Veneer & Panel Co. v. Commissioner*, *supra*, pp. 322, 323. The Tax Court also correctly applied, in terms of relevance, the comparison of the amount of the rental payments to the value of the property (R. 24) to analyze the true nature of the payments. *Watson v. Commissioner*, *supra*; *Bowen v. Commissioner*, *supra*. There is no doubt that the Tax Court utilized these two sets of economic factors in reaching a conclusion, but that is not to say, as taxpayer contends, that the court regarded the intention of the parties as "merely supplemental to economic 'facts' alone" (Br. 10) or that it solely looked to economic tests in reaching a conclusion, thereby contravening *Benton v. Commissioner*. On the contrary, the Tax Court based its conclusion on many factors, as evidenced by its findings (R. 12-18) and conduct of the entire hearing (R. 33-145). The court specifically stated (R. 20):

² See 4 Mertens, Law of Federal Income Taxation, Sec. 25.109; Blumenthal and Harrison, The Tax Treatment of the Lease With an Option to Purchase, 32 Texas L. Rev. 839, 852 (1953-1954); 53 Columbia L. Rev. 277, 279 (1953).

To properly discern the true character of the payment, therefore, it is necessary to ascertain the intention of the parties as evidenced by the written agreements, read in the light of the attending facts and circumstances existing at the time the agreement was executed.

The court further stated (R. 24) :

In the light of the foregoing *and upon consideration of the record as a whole*, we are convinced that through the annual rental payments petitioners were in fact acquiring a substantial equity in the property, and that it was so intended by the parties. (Emphasis added.)

In connection with his reliance upon the *Benton* case before this Court and his insistence that the Tax Court erred by applying an objective economic test, it is interesting to note the taxpayer's reversal of position before the Tax Court and on appeal. Before the lower court, taxpayer relied on the Tax Court decision in *Benton v. Commissioner*, decided September 20, 1950 (1950 P-H T.C. Memorandum Decisions, par. 50,223), to urge that if the fair market value of the property was not in excess of the option price then taxpayer was not acquiring an equity by means of the rental payments. To support this contention, taxpayer went to great lengths to prove, by means of his own testimony (R. 52-54), and that of an expert appraiser (R. 109-143), that the value of the property was less than the \$24,000 option price. Now taxpayer seeks to reverse the decision of the Tax Court on the grounds that objective economic tests were the basis for the

court's conclusion. (Br. 10-11.) The fact of the matter is that the Tax Court did not base its decision upon the test suggested by taxpayer, but instead upon consideration of the record as a whole, including the two economic factors already discussed.³ The court did not solely rely upon, or over-emphasize, a purely objective economic test and thus did not contravene the rule of *Benton v. Commissioner*.

The other case which taxpayer strongly relies upon is *Breece Veneer & Panel Co. v. Commissioner*, *supra*. In respect to this decision, taxpayer appears to argue that, since the Tax Court relied on the rationale there expressed and the decision was reversed on appeal, therefore the Tax Court erred. (Br. 8.) However, the particular rationale cited with approval by the Tax Court was (R. 20):

The Court held [in *Breece Veneer & Panel Co.*], despite the explicit language of the lease agreement, that since the "rental" payments materially exceeded the current fair rental value of the property, and since the aggregate payments paid prior to the exercise of the option were disproportionate to the relatively small final amount required to acquire title, petitioner was building

³ The court did find that the taxpayer did not meet his burden in respect to the fair market value of the land and on February 9, 1948, such value was closer to \$48,000 than the \$21,750 urged by the taxpayer. It is submitted, the court had ample evidence to support this finding. (R. 22-23.) The court did *not* find, as a corollary to taxpayer's proposition, that since the value of the land is greater than the option price the rental payments are thus establishing an equity. Rather, the finding as to valuation seems to be utilized in corroborating Mr. Butler's intent to sell and to view the transaction as a whole whereby total payments are equivalent to the total value. (R. 21.)

up a substantial equity interest in the property, as intended by the parties, and that the payments, in reality, were being applied to the agreed purchase price of the property.

The court further stated (R. 20):

We pointed out in *Bruce [sic] Veneer and Panel Co., supra*, and *Chicago Stoker Corporation, supra*, that the payments there in question (as in the instant case) may have dual potentialities, that is, they may emerge as partial payments of the agreed purchase price on the one hand or rent for the use of the property on the other. As emphasized in those cases, it is difficult to categorize the payments for income tax purposes. To properly discern the true character of the payment, therefore, it is necessary to ascertain the intention of the parties as evidenced by the written agreements, read in the light of the attending facts and circumstances existing at the time the agreement was executed.

The Seventh Circuit in no way criticized or overruled the rationale which the Tax Court in the instant case cited as applicable and which is in full harmony with this Court's decision in the *Oesterreich* case *supra*. Rather, the decision in the *Breece* case did no more, in this respect, than hold that the Tax Court erred in its findings and interpretation of facts and did not reverse the court as to its statements that certain economic comparisons are acceptable as evidence of the intention of the parties in such a situation. On the contrary, as already noted, the Seventh Circuit gave implied approval to a comparison of rents actually

paid with fair rental value as being of probative value. See *Breece Veneer & Panel Co. v. Commissioner*, *supra*, pp. 322, 323. The facts in the case at bar are materially different, in respect to the aforementioned comparison of rents, than those upon which the court reversed in the *Breece* case.

Another rule which taxpayer seeks to glean from the *Breece* decision through its citation of *Helvering v. San Joaquin Co.*, 297 U.S. 496, is that there can be no equity until the option is exercised. (Br. 8.) If such were the effect of the *Breece* decision, it would, quite plainly, be contrary to this Court's decision in *Oesterreich* and would have to be rejected. However, the Seventh Circuit cited the Supreme Court's decision purely as dictum and an examination of the latter decision shows it to be of extremely doubtful application to a situation such as is here presented.⁴ In citing the same decision, the court in *Benton v. Commissioner*, *supra* (p. 752) prefixed its statement as follows:

If the parties in good faith actually intended to enter into a lease contract, then the taxpayer, up until the time that he exercised his option to purchase, acquired no title to or equity in the property. (Emphasis added.)

⁴ The Supreme Court was there dealing with the question of whether real property was "acquired" when a lease with option was made or when the option was exercised for purposes of determining which party held the real interest on March 1, 1913, in computing valuation for capital gains. The decision did not involve the section of the statute in question and the Court's pronouncements in respect to "equitable interests" are certainly not determinative of this issue. See *Helvering v. San Joaquin Co.*, *supra*, p. 498.

Taxpayer, quoting (Br. 10) from the *Benton* case, p. 752, also stated that "the parties had full liberty to contract as they pleased" and that they had a right to exercise their own judgment (Br. 13). Aside from the fact that the decisions cited by taxpayer in support of the former contention (Br. 10) were actually cited by the court in support of another proposition,⁵ this concept is also prefaced by the court as follows: "*Within the limits of reason*, the parties had a right to exercise their own judgment * * *." (Emphasis added.) *Benton v. Commissioner, supra*, p. 752. It is with this limitation in mind that the courts, in such situations, seek to determine the actual substance and nature of the payments termed "rentals."

In summary, the Tax Court correctly pierced the form of this transaction and, by determining the intention of the parties from the record as a whole, ascertained that taxpayer was acquiring a substantial equity in the property by means of his rental payments. It might also be noted that it could equally be held that, under the facts, taxpayer, by such payments, was taking title and it was so intended by the parties. In either instance, deductibility under Section 23(a) (1)(A), *supra*, is precluded.

⁵ To be specific, "Whether what is in form a lease is in effect a conditional sale contract depends on the intention of the parties." *Benton v. Commissioner, supra*, p. 752.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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July, 1956

No. 15040

IN THE

UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

D. M. HAGGARD AND NILA HAGGARD,
Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONERS

On Petition for Review of the Decision of
The Tax Court of the United States

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ARGUMENT

I

Respondent's brief offers one major argument in support of the Tax Court's decision herein. It is that whether a taxpayer is paying rent or making an investment in the property is a question of the intention of the parties and is therefore one of fact and should not be disturbed unless clearly erroneous (Br. 7).

From such a premise it is then urged that there was *ample* evidence to support the Tax Court's finding that both parties intended, and taxpayer did in fact, acquire a substantial equity as a result of the "rental" payments (Br. 7-8).

Such a contention ignores (1) the quality of evidence upon which the findings of fact are based, (2) the weight of the evidence, and (3) whether the findings, as petitioners urge, were the result of an erroneous view of the law. In short, it avoids this Court's ruling that:

"A finding of fact is clearly erroneous when, *even though there is evidence to support it*, the appellate court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Gillette's Estate v. Commissioner*, 9 Cir., 1950, 182 F. 2d 1010, 1014."

Stated in another fashion by the U.S. Court of Appeals for the Sixth Circuit in *Wright Bernet, Inc. v. Commissioner*, 6 Cir., 1949, 172 F. 2d 343, 345:

"... The findings of a fact of the court below to the extent that they are unsupported by substantial evidence or are clearly against the weight of the evidence, *or were induced by an erroneous view of the law*, are not binding upon this Court."

Since petitioners specification of error No. 10 urged that the "Tax Court erred in that its decision is not supported by the evidence, is clearly erroneous, and is not in accordance with law," it hardly seems a sufficient answer to say there is "ample evidence" in the record to support the Tax Court's finding that the parties intended, and the taxpayers in fact, acquired a substantial equity by means of the rental payments (Br. 7, 8).

But what of the major premise itself? Is it correct to say that whether the taxpayer is making an investment in the property is a question of the intention of the parties and therefore a determination of fact? Not according to this Court's opinion in *Oesterreich v. Commissioner*, 9 Cir., 1955, 226 F. 2d 798, a case cited repeatedly by respondent in his brief. In that opinion, it was said:

"We are of the opinion that the Tax Court erred in treating the question of intention of the parties as one of fact collateral to the written instrument. The document was not ambiguous, and evidence as to surrounding circumstances was not required to explain it. The intention of the parties, *as expressed in the instrument* was cardinal, as has been construed in the light of the applicable statute. *No question of fact was involved . . .*" *Oesterreich v. Commissioner*, supra at 803.

Thus, when respondent relies on the *Oesterreich* case, supra, followed by 14 pages of argument reviewing the Tax Court's findings of fact collateral to the instruments (Br 8-21), he is doing precisely what this Court says is error. Consequently, the respondent's defense that the question of intention is one of fact which cannot be disturbed is difficult to accept in the face of the above quoted language that no question of fact was involved. Nor do the other two cited cases from this Court support the proposition that:

"This question of intent is clearly factual *and* findings and inferences of fact made by the Tax Court will not be disturbed unless clearly erroneous. *Pacific Homes v. United States*, 230 F. 2d 755 (C.A. 9th); *Ward v. Commissioner*, 224 F. 2d 547 (C.A. 9th); . . ." (Br. 9).

It is true that each of the two cited cases from the Ninth Circuit sustain that portion of respondent's above sentence following the word "and" stating that findings of fact are not disturbed unless clearly erroneous. The proposition that the question of intent is factual was not before the Court in either case. In the *Pacific Homes* case, supra, the issue was whether a corporation held real property primarily for sale to customers in the ordinary course of its trade or business. In *Ward v. Commissioner*, supra, the question was whether upon a sale incidental to the dissolution of a partnership, the distributive shares are ordinary income or capital gain. Each case held that the Court would not disturb a finding of fact of the lower court unless clear error appeared or the finding was clearly erroneous. However, neither case is authority for the complete sentence stating the principle that the

question of intent is clearly factual *and* findings and inferences of fact will not be disturbed unless clearly erroneous.

Petitioners submit that while respondent has adopted certain language from the *Oesterreich* case, *supra*, the holding itself actually supports their contention that the Tax Court misapplied the law. In the *Oesterreich* case, *supra*, the "lessee" agreed to pay "lessor" \$679,380.00 in monthly installments over a period of 67 years and eight months after the payment of which he could acquire fee title by the additional payment of \$10. This Court held that the intention of the parties according to the instrument was to effectuate an installment sale. But what are the facts in the instant case? Petitioners paid \$22,000. in "lease" payments during 1948 and 1949, and were required to pay \$24,000. in 1950 if they wished to purchase the real property. The cases are simply not analogous. In fact, the *Oesterreich* decision, *supra*, was distinguished by the Seventh Circuit in *Breece Veneer & Panel Co.*, 7 Cir., 1956, 232 F. 2d 319 because of this great difference.

In this regard, respondent has, on page 20 of its brief, quoted from *Watson v. Commissioner*, 9 Cir., 1932, 62 F. 2d 35 to buttress the view that the parties intended a sale. After pointing out that the rent paid by petitioners amounted to 46% of the total considerations, the following quotation from the *Watson* case, *supra*, appeared:

"It is unthinkable that the payment of \$47,000 which is about 43 per cent of the entire consideration, upon property valued at \$109,900 is an *annual* rental, for that is the approximate amount received by the "lessor" during the year 1924. (Emphasis supplied.)

This is like trying to analogize Miss Marilyn Monroe with Carrie Nation or the campaign techniques of ex-President Harry Truman with those of ex-President Calvin Coolidge. How can respondent compare an *annual* rental constituting 43% of the total consideration (*Watson v. Commissioner*) with an annual rental of \$12,000 or 25% of the total consideration paid in this

case. The answer is that he does not. Instead, he has compared an annual rental of 43% paid in *Watson v. Commissioner* with "the rental payments" of \$22,000. paid in this case over a period of *two* years. Here the annual rental which was paid for 1949 constituted only 25% of the total consideration of \$48,000. Is it "unthinkable" that a farmer would pay 25% of \$48,000 (the fair market value of the property as determined by the Tax Court) as rent? In view of the following factors, petitioners submit that a negative answer is proper.

In response to questioning from the trial judge, Wayne M. Akin, the only expert on the fair market value of the subject real property who testified, stated as follows:

"The Court: Would you say the fair rental value had the slightest relationship to \$12,000 a year?

The Witness: Yes, I would. There was a lot of land leased at that time for around that figure.

The Court: All right.

The Witness: In fact, I personally rented some land *at that figure* at that time. (R. 132)

Furthermore, the petitioner D. M. Haggard testified, and documentary evidence was introduced, showing that he paid \$70 an acre of rent for 145 acres of farm land during 1955 and 1956 at a time when farm prices were and are much lower (R. 47-50). The petitioner testified, without any impeachment on cross-examination, that the land being rented for \$70 an acre in 1955 and 1956, with no option to purchase, was comparable as to quality of the soil, was in the same locality, and had water costs which were comparable (R. 47, Ex 3). Because the \$12,000 paid in 1949 for 160 acres of land results in a per acre rental of \$75 per acre, it cannot be said that the payment of \$75 an acre for land worth \$300 an acre (according to the Tax Court's findings of fact) is "unthinkable". As Mr. Akin testified:

" . . . at that time, there was a terrific scramble for land in rental. The pattern of occupancy from sale, pattern of sales was

bad and farmers were trying to get land under rental conditions. (R. 132)

To those who come from the cold one crop farm country of East, it probably does seem inconceivable that a good farmer would pay \$75 an acre rent for farm land. However, if the Court will take judicial notice that there are 350 days of sunshine each year in Arizona's desert country surrounding and including the subject 160 acres, and consider that two to three crops a year can be and are grown on the same land, such a rent is not unthinkable.

Because respondent's comparison of the percentage of rent with the total consideration is the only examination of the intent of the parties as reflected by the instruments, rather than facts collateral to the instruments, petitioners turn aside from respondent's factual arguments concerning the cases of *Breece Veneer & Panel Co. v. Commissioner*, 7 Cir., 1956, 232 F. 2d 319 and *Benton v. Commissioner*, 5 Cir., 1952, 197 F. 2d 745.

Because pages 8 to 21 of respondent's brief contain a review of facts collateral to the instruments, petitioners temporarily turn aside to his arguments, beginning on page 21, concerning the cases of *Breece Veneer & Panel Co. v. Commissioner*, 7 Cir., 1956, 232 F. 2d 319 and *Benton v. Commissioner*, 5 Cir., 1952, 197 F. 2d 745, cited by petitioners in their opening brief.

It will be recalled that petitioners urged that the Tax Court contravened the rule of *Benton v. Commissioner*, *supra*, by ascertaining the intention of the parties from economic "facts" alone (Pet. Br. 10). This view was based on specific language from the Tax Court's opinion stating that if the annual payments materially exceed a current *fair rental value* and the total payments made before the option was exercised are disproportionate to the relatively *small final amount* paid to acquire title, petitioner is obtaining as equity *as intended by the parties* and the payments rae in reality applied to an agreed purchase price (R. 19-20). In other words, petitioners took the Tax Court at its word. This is what it said it was doing. However, this is not so says respondent.

When the Tax Court added the phrase "and upon consideration of the record as a whole," in the last paragraph of its opinion, it escaped such criticism.

Petitioners submit that such a phrase is standard equipment in nearly all opinions of good trial judges, and that it is not sufficient when the entire tenor of the opinion indicates clearly that an objective economic test was in fact the basis of the decision. If respondent is correct in saying that the Tax Court did, in reality, go along with *Benton v. Commissioner*, supra, why is it that the Tax Court opinion said the *Benton* case was not controlling here (R. 24). If respondent's view is accepted as correct, there will be very few reversals possible. Furthermore, if this decision of the Tax Court is affirmed, every taxpayer-lessee in Montana, Idaho, Nevada, Arizona, California, Oregon and Washington will be confronted by a District Director of Internal Revenue claiming that the parties intended the lessee to acquire an equity if the lease payments materially exceed current fair rental value and the total payments paid before the option is exercised are disproportionate to the relatively small final amount paid to acquire title. That is the rule announced by the Tax Court which was rejected by the Seventh Circuit in *Breece Veneer & Panel Co. v. Commissioner*, supra.

Regarding the Seventh Circuit's reversal of *Breece Veneer & Panel Co., v. Commissioner*, supra, which rationale regarding fair rental value was relied on here, respondent claims the rationale was not overruled but given implied approval. (Br. 25). This is difficult to follow. How does a U.S. Court of Appeals reverse the Tax Court and at the same time give "implied approval" to the rationale upon which the Tax Court rested its decision. A reading of the *Breece* opinion shows that the court rejected *Judson Mills*, 11 T.C. 25 (1948), one of the same cases relied on by the Tax Court in the instant case, on the ground that it involved a lease of machinery with an option to purchase for a relatively small amount. *Breece Veneer & Panel Co. v. Commissioner*, supra, at 321. Also the *Breece* opinion stated that *Truman Bowen*, 12 T.C.

446 (1949), likewise relied on by the Tax Court herein, was inapplicable, and that *Oesterreich v. Commissioner*, 9 Cir., 1955, 226 F. 2d 798, *Watson v. Commissioner*, 9 Cir., 1932, 62 F. 2d 35; *Jefferson Gas Coal Co. v. Commissioner*, 52 F. 2d 120; all relied on in respondent's brief, were not decisive.

The key to respondent's avoidance of *Breece Veneer & Panel Co. v. Commissioner*, *supra*, is the statement that:

"The facts in the case at bar are materially different, in respect to the aforementioned comparison of rents, than those upon which the court reversed in the *Breece case*." (Br. 26).

Yes, but in whose favor? In the *Breece* case, the lessee agreed to pay \$20,000 per year, for a term of five years, renewable for three additional years, and was given an option to purchase the property for \$50,000 at the end of the fifth year. Thus, the lessee would pay \$100,000 of rent for five years and then be able to purchase for \$50,000. Using respondent's argument (Br. 20), the rental payments constituted $66\frac{2}{3}\%$ of the total considerations while in this Haggard appeal, the rental payments (\$22,000) only amounted to 46% of the total considerations of \$48,000. Also, it is clear that a final payment constituting $33\frac{1}{3}\%$ (\$50,000 of total of \$150,000 in *Breece* case) is a relatively smaller final payment than the 50% (\$24,000 of total of \$48,000) required of petitioners in this case. Yet, the *Breece* opinion pointed out that the "amount of rent after five years lacked the substantial sum of \$50,000.00 to make the taxpayer the owner. If one-third is a substantial sum, it follows that 50% is more substantial, and therefore a stronger case for petitioners.

On page 26, respondent states that:

"another rule which taxpayer seeks to glean from the *Breece* decision through its citation of *Helvering v. San Joaquin Co.*, 297 U.S. 496, is that there can be no equity until the option is exercised. (Br. 8). If such were the effect of the *Breece* decision, it would quite plainly, be contrary to this Court's decision in *Oesterreich* and would have to be rejected. However, the Seventh Circuit cited the Supreme Court's decision purely as

dictum and an examination of the latter decision shows it to be of extremely doubtful application to a situation such as is here presented." (Br. 26).

First of all, *Helvering v. San Joaquin Co.*, 297 U.S. 496 (1936) is applicable, it cannot be rejected simply because it is (assuming this to be true) "contrary to this Court's decision in *Oesterreich*. Once a U.S. Court of Appeals concludes that a decision of the U.S. Supreme Court is applicable, it is required, under our system of judicial administration, to follow that decision.

Secondly, the citation of *Helvering v. San Joaquin*, *supra*, was not dictum. It followed two sentences which referred specifically to the language of Section 23(a)(1)(A) stating:

"The very language of the Statute establishes that it is not applicable to the facts or the evidence in this case. There was no equity until the option was exercised. See *Helvering v. San Joaquin Fruit & Investment Co.*, 297 U.S. 496, 56 S. Ct. 569, 80 L. Ed. 824." *Breece Veneer & Panel Co. v. Commissioner*, *supra* at 324.

Third, the *Hedvering v. San Joaquin* decision, it is submitted, is authority for the principle that there can be no equity until the oution is exercised. In that case, the question was whether real property was acquired by a "lessee," under a lease-option agreement, when the option was granted or when it was exercised. Mr. Justice Roberts writing for a unanimous court, explained at page 498, why the property was not acquired until the date the option was exercised.

" . . . But the option is admittedly not the same property as the land. So conceding, the respondent still insists that ownership of the option created an interest in the land. This would not be true of a bare option unconnected with a lease; but we are told that because embodied in the lease the agreement became a covenant real and gave the lessee a species of inteerst or property in the land. The weight of authority is to the contrary, . . . "

Also the *Helvering v. San Joaquin* case was cited by the court in

Benton v. Commissioner, supra, but respondent argues that it is qualified by the phrase:

"If the parties in good faith actually intended to enter into a lease contract, then the taxpayer, up until the time that he exercised his option to purchase, acquired no title to or equity in the property." (Br. 26).

But how does this affect this case? The Tax Court made no finding that the parties did not act in good faith.

On page 27 of respondent's brief, it is said that the rule that parties have full liberty to contract as they please is limited by the phrase "Within the limits of reason" which phrase is fully quoted at page 13 of petitioners' opening brief. However, no interpretation of this limitation is given nor are any standards offered to measure the boundaries of the phrase. Respondent is really contending that it means except when a lessee acquires an option to purchase. (Br. 27).

II

Because of this Court's opinion in *Oesterriech v. Commissioner*, supra, that the Tax Court erred in treating the question of intention of the parties as one of fact collateral to the written instrument, petitioner have urged above that respondent's review of the facts from pages 8 to page 21 are irrelevant to the determination of this appeal. However, courts must disagree with one of the opposing sides, and therefore the following reply is given to respondent's factual analysis if the Court deems the facts collateral to the instrument significant.

The first of respondent's factual contentions relating to intent of the parties is found in the first paragraph at page 11 of his brief, and concerns the comparison of total rent to total consideration. To this argument petitioners have already replied. It should be noted that this is a purely economic test. However, respondent dismissed even these contentions by stating in the subsequent paragraph that:

"However, it is a matter of indifference what the taxpayer did or did not believe. As *Oesterreich* demonstrates, the important consideration is what the parties (p. 802) intended to happen." (Br. 11).

The second factual support for the conclusion that the parties intended that the lessee would acquire an equity is the statement on page 11 of respondent's brief that:

"It is obvious that, by the \$22,000 payments denominated as rent plus the \$2,000 payment for the option, the parties intended that the taxpayer would become entitled to full ownership of the property by the payment of an additional \$24,000 at the end of a period of less than two years."

Why? This is a patent non sequitur. If the parties in the *Breece* case did not so intend when \$100,000 of a total of \$150,000 (66⅔%) has been paid, why is it obvious in a case where only \$24,000 of a total of \$48,000 (50%) was paid? And suppose it was agreed that the parties intended that the payment of an additional \$24,000 would subsequently entitle the lessee to "full ownership." Does that fact alone convert a lease into a sale? If so, every lease containing an option to buy is a sale under Section 23(a)(1)(A). This same argument was made by respondent in the *Breece* case, *supra*, and the court rejected it saying at page 323:

"... Manifestly, one who takes an option does so with the hope of exercising it, but the hope does not create an equity."

Again, petitioners ask the Court to note that the intent of the parties is being discerned from pure economic criteria.

Next respondent says, on page 11, that "quite plainly" it was the \$22,000 payments plus the \$2,000 option payment which formed the consideration enabling petitioners "to complete the sale" for only \$24,000 (Br. 11). To begin with, the phrase "to complete the sale" assumes the answer to the very question before the Court: Did the Tax Court err in determining that the parties intended petitioners to acquire an equity? Even so, what does the phrase "quite plainly" add to the strength of re-

spondent's position? It is a statement of preference or characterization rather than basic argument. And suppose every one agreed the \$24,000 did enable the petitioners to acquire the real property by paying \$24,000 more in 1950. The same situation existed in the *Benton* and *Breece* cases, *supra*, and in fact it is inherent in every case involving lease-option agreements. The argument, stripped of refinements, means that all lease-option agreements violate Section 23 (a) (1) (A) because all prior payments enable a taxpayer to complete a transaction for a final payment. Without these prior payments, the terms of the lease-option would not be fulfilled, and the question of this case would not come before a court. This too is another economic test being utilized to infer intent contrary to that expressed in the documents.

Following the above point, respondent states that "the taxpayers, by means of these payments, acquired a real and substantial equity in the property—an equity which made it imperative that he exercise the option *"so long as the value of the property did not fall below \$25,000."* In other words, the argument is that the parties intended the petitioners would acquire an equity if the property did not fall below \$24,000 when the option date arrived. According to this argument the intention of the parties at the date of executing the lease-option would constitute a "floating" or "evanescent" intention that appears and reappears each year depending on the then existing best guess as to the fair market value on the date when the option may be exercised. The Court, in the *Breece* case, *supra*, at page 322 said that:

"The fact that the option was exercised is not indicative of the intention of the parties. It was immaterial that the property proved to be a bargain to the taxpayer. The R.F.C. probably would not have sold the property for \$50,000.00 in 1943 . . ."

At page 323 of the opinion, the *Breece* opinion also said:

". . . until the option was actually exercised the R.F.C. was not permitting the taxpayer to have any equity."

This argument of respondent's is another purely objective eco-

conomic test which is being utilized to ascertain the intent of the parties.

Beginning on page 12 of respondent's brief facts and circumstances surrounding the execution of the agreements on February 9, 1948 are submitted to the Court. The first of these notes that the total of annual payments, option payment, and option price, was \$48,000 which coincided with the \$48,000 which Mr. Butler "sought" as a seller of the property, and which amount he had been offered a week earlier. To this it is replied that it is not what one seeks that matters in the world of dollars and cents. It is what one can get, and obviously Mr. Butler could not get a "sale" for \$48,000. Property owners usually list their real property at a high asking price in the hope that some uninitiated and trusting soul will offer the sum. In this case, the Tax Court found as fact that people named Talby offered Mr. Butler \$48,000 just prior to the date of the transaction with petitioner. However, petitioners have been unable to find testimony of Mr. Butler that he was offered \$48,000 by the Talbys. On pages 87 and 88 of the record, Mr. Butler testified, in answer to respondent's questions as follows with respect to the Talby offer:

"Q. Did anyone offer to buy this property from you?

A. Fellow named Talby and his brother-in-law.

Q. When was that offer made?

A. Oh, they was there about a week before this and they came back two or three times and their father called me up and told me that he would sign the paper and guarantee the payments (63) and everything. One of these boys just come back from service a couple years before, both of them was, as far as that was concerned, and \$8,000 he wanted to pay down, according to that, what do you call it there? Says five, but I think it was eight. I thought it was eight at that time. Then the balance of ten equal payments, in other words."

In any event, petitioners suggest that the "fact" of an offer to buy for \$48,000 from another individual (assuming one existed) adds nothing to an interpretation of the intention of the

parties to an entirely separate and distinct transaction. This is much more remote than the facts of the *Breece* case where Mr. Breece, as President of the Company, wrote the R.F.C., two years before the lease-option agreement was executed, that he was interested in purchasing the property for \$100,000. Yet this prior dealing by the same taxpayer which ultimately acquired the property via the lease-option agreement was not considered by the Seventh Circuit as reflecting intention to purchase insofar as the lease-option agreement was concerned. Thus, it is difficult to understand how the intention of Mr. Butler insofar as the Talby uncompleted transaction would have any bearing on the intention of Mr. Butler and Mr. Haggard as expressed in written instruments.

Following the above argument, the respondent, on page 13, emphasizes that intention is shown by Mr. Butler's belief on February 9, 1948 that the legal effect of the transaction was a sale. But how does such a view square with the respondent's citation of the *Oesterreich* case, supra, at page 801 wherein this Court said:

"... If the parties enter into a transaction which they honestly believe to be a lease but which in actuality has all the elements of a contract of sale, it is a contract of sale and not a lease no matter what they call it nor how they treat it in their books..."

Would not the converse also be true? If the parties (Mr. Butler only) honestly believe the transaction to be a sale but which in actuality has all the elements of a lease, it is not a lease no matter what Mr. Butler (a layman) calls it? Also, how does such a contention fit with respondent's prior argument, on page 11 of his brief, that "... it is a matter of indifference what the taxpayer believed." How does the belief of one party to the transaction support an "intention" that the legal effect was a sale when respondent is also arguing, on page 9 of his brief, that the intention of the parties cannot be determined unilaterally? In this regard it is significant to note that the Tax Court made no finding of fact that Mr. Butler "intended" a sale. It simply found that the parties

intended that petitioners would acquire an equity in the real property. The reason it did not make such a finding regarding Mr. Butler's belief is best illustrated by the following testimony of Mr. Butler.

"The Court: Can you tell me why or wherefor or just what happened, if you know, as to how this got changed over from a \$48,000 sale to a lease for \$10,000 for a little less than the entire year '48, \$12,000, '49, \$2,000 option and \$24,000 purchase price? What happened, if you remember, that moved it from one to the other?

The Witness: I discussed it, they discussed it.

The Court: Who discussed it.

The Witness: Mr. Merrell, Mr. Haggard, and myself, and they agreed and *I agreed to it at that time that way.*" (R. 95-96). Emphasis supplied.

In short, Mr. Butler specifically agreed, after discussing the matter, to lease the 160 acres for two years and grant petitioners an option to buy at a purchase price of \$24,000 in 1950 before he signed the instruments.

On page 14 and 15 of his brief, respondent continues with Mr. Butler's belief as to the legal effect of the transaction. Petitioners submit that for the reasons stated in the preceding paragraph, his belief is not relevant. Petitioners also submit that the question to be determined by the trial court was whether the transaction was, in law, a sale or a lease, and the belief of laymen concerning the legal effect of their transaction adds very little to the answer to that question. However, even if it did, the contrary belief of petitioners would balance out the effect of the other party's belief as to legal effect. The truth of the matter is that the parties, in a lease-option agreement, often view the transaction differently. Possibly that is why this Court, in the *Osterreich* case, was only interested in the instrument and not what the parties honestly believed the transaction constituted.

Should the Court adopt the view, urged by respondent, that

the testimony of one party concerning the belief as to the legal effect of the transaction, regardless of what the terms of the instrument provide, is reflective of intention of the *parties*, which respondent agrees cannot be determined unilaterally, there will be a frightful deluge of these cases. The reason, of course, is that most of the "lessors" in lease-option agreements would prefer to treat the proceeds as capital gain rather than ordinary income, and will be bound to give their opinion evidence concerning the legal effect of the transaction to protect the capital gain status of the transaction.

Insofar as the testimony of Mr. Butler, found on pages 15 and 16 of respondent's brief, is concerned, it can hardly be said to reflect a firm belief that the legal effect of the transaction was a sale because of his statement on page 16. There Mr. Butler said he was convinced that it was "more or less all right." Someone who takes a step on a "more or less" basis cannot be said to be of the fixed belief that the legal effect of the transaction was a sale. These words indicate an individual who had serious reservations that the transaction was a sale.

After setting forth Mr. Butler's testimony, respondent contends that Mr. Butler's intention to sell was "corroborated" by the treatment of the transaction as a sale on his 1948 Federal income tax return filed a month or so after the lease and option were executed. Surely respondent is not seriously suggesting that the incidence of taxation can be determined by the characterization of a transaction on one taxpayer's return. And even if the Court would agree, would not such a factor be cancelled out in view of the fact that the other party to the transaction reported the transaction as a lease on his return? This argument illustrates forcefully that both the Commissioner and the Tax Court have wholly disregarded everything except the alleged intention of one of the parties which is ascertained from facts collateral to the instruments.

The crux of respondent's argument is that petitioners did not

meet their alleged burden of proving it was Mr. Butler's intent that the legal effect of the transaction was to be a lease (Mr. 16). What respondent's review of the facts reveals however, is that he believes this intent must be proved by facts corollary to the instrument. This view is incorrect. *Oesterreich v. Commissioner*, supra. However, even if such an argument was sound, the testimony of Mr. Butler's shows that he entered into a lease transaction with petitioners, after discussing it, and after agreeing "to it at that time that way" (R. 96). He wanted to get his money out of the real property as fast as he could, and the only way that could be done was to lease it to Mr. Haggard for two years with an option to buy. (R. 98-99). That is why he did not "sell" to different people who wanted to trade a mortgage, or an apartment house, or twenty acres of land, or a Ford (R. 87). Mr. Butler entered into the lease-option transaction with his eyes wide open.

On page 18, respondent contends there is nothing inconsistent about treating the transaction as a sale on February 9, 1948 and the fact that Mr. Butler borrowed \$12,000 on the property fourteen months after he "sold" it. Petitioners submit it is inconsistent with a conclusion that a sale occurred on February 9, 1948, and the belief of Mr. Butler that the legal effect of the transaction was a sale. A vendor of real property normally does not mortgage the property after it has been sold.

Again on page 18, respondent urges "several economic factors" as reflecting the intent of the taxpayer (Br. 18). The first is the Tax Court's finding of fact that the fair rental value was \$5,000 in 1949. The case of *Breece Veneer & Panel Co. v. Commissioners*, supra, rejected such economic data as reflecting the intent of the taxpayer to purchase. Also, a reading of Mr. Akin's testimony will reflect that such a finding is contradicted by his other testimony (R. 132-133).

At page 19, respondent emphasized that the taxpayer "utilized only 90 of the 160 acres for crops in 1949." This is misleading because Mr. Haggard also testified that in 1949 he ran cattle

on that portion of the 160 acres on which there was not enough water for crops (R. 62). How can a farmer cultivate more land in a desert area than 90 acres of 160 acres if there is not enough water for more than 90 acres? The grazing of cattle on the balance of the land shows its full utilization.

Lastly in the factual review, respondent argued that the Tax Court's determination of fair market value of \$48,000 for the land on February 9, 1948 was supported by:

- (1) Mr. Butler's original purchase price of \$40,000 paid in 1945.
- (2) Mr. Butler's listing of the property for \$48,000.
- (3) The alleged failure of taxpayer's expert to include certain water rights in his appraisal.

As far as No. (1) is concerned, it must be clear that the logical or inferential relationship between what one pays for real property in 1945 and its fair market value three years later is slight. This is particularly true when the record shows that Mr. Butler still owed \$22,000 to Mr. Ewalt in 1948 and \$6,500 to the National Farm Loan Association after having made two annual payments of \$5,000 (R. 91, 97, 100). In short, Mr. Butler paid only \$1,500 down when the property was purchased for \$40,000, and the purchase price of \$40,000 must be viewed in that light. Nor does the listing of the property for \$48,000 have any real relationship to fair market value. There is a big difference between an asking price and the price one will sell for if the cash can be obtained in two years by means of a lease and a subsequent sale. Finally, the record does not sustain the Tax Court's finding that Mr. Akin's valuation of \$21,750 on February 8, 1948 could not be accepted because he had given no consideration to the significant factor of the right to the use of water which was essential to the production of the land "because" of his assumption that such right was not appertinent to the land (R. 22). From the above finding of the Tax Court, it would appear

that Mr. Akin failed to value the right to obtain water on the land. The record is otherwise.

Mr. Akin testified that one of the factors considered by him in valuing the 160 acres was that the land received three and one-half acre feet per acre from the Salt River Valley Water User Association from *their* pumps which delivered the water into irrigation ditches (R. 112-115). He specifically testified that there were two other private wells, but that those wells provide all of the water from which there was firm water right appurtenant to *that* land (R. 115). He testified that he valued the subject real property without considering the well because the water therefrom was not appurtenant to the Butler land (R. 137). The Tax Court, assuming the water from that well to be the source of water for the property, rejected Mr. Akin's valuation of the land, saying the record failed to show whether the right was or was not appurtenant to the land. (R. 22).

Furthermore, even if the Tax Court had been correct, Mr. Akin's testimony provided the fair market value. He said:

"But the water from the other wells is appurtenant to the land. The land is a fee simple title, fee simple title to the land includes certain water. The Peninsular and Horowitz Water is a part of the fee simple title of that land, it is appertinent to the land, cannot be separated from it. This other we are talking about is not appertinent to the land, can be separated from it, and therefore is something separate (116) and hence it should be valued separately which I did, and the value of the water, *if you are going to consider it then, the value of the interest in the well should be added to my appraisal*; if you are going to take that, it is just as separate as though it were a truck or something else that could be separated from the land, you see" (R. 136)

In view of Mr. Butler's testimony that he had a \$2,200 well "again that property" (R. 83-84), the \$21,750 appraisal of Mr. Akin's could be added to the \$2,200 for a total fair market value on February 8, 1949, of \$23,950 even if the water from the questioned well had been appurtenant to Mr. Butler's land.

CONCLUSION

The decision of the Tax Court should be reversed.

Respectfully submitted,

W. Lee McLane, Jr.

Nola McLane

Counsel for Petitioners

July, 1956

United States Court of Appeals
For the Ninth Circuit

MA CHUCK MOON and MA CHUCK WOON, *Appellants*,
vs.

JOHN FOSTER DULLES, Secretary of State of the United States, HERBERT BROWNELL, Attorney General of the United States, and JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellees*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS' OPENING BRIEF

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rector, Immigration and Naturalization
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Appellees.

No. 15041

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court is conferred by the provisions of Section 2201 Title 28 U.S.C.A., Section 1503 (a) Title 8 U.S.C.A., and the Administration Procedure Act, Sections 1009, 1011, Title 5 U.S.C.A., and upon this court by the provisions of Section 1291 Title 28 U.S.C.A.

PRELIMINARY STATEMENT

Appellants, together with one, Ma Chuck Wun, were admitted to the United States in possession of certificates of identity issued to them by the American Consulate at Hong Kong, British Crown Colony, China,

only after the District Court by order directed to the Secretary of State to do so, as the sons of an American Citizen, in September, 1952, for the purpose of prosecuting an action theretofore commenced for them by their father, Ma Tarn Sun, as their next friend, under the provisions of Section 503 of the Immigration and Naturalization Act of 1940, Section 903 Title 8 U.S.C.A., since repealed.

A trial was had in that proceeding two years later in 1954. Under a pretrial order in that case, on January 7, 1954, the issues were confined to the identity of appellants and Ma Chuck Wun as the blood sons of Ma Tarn Sun, their father, an American citizen, and as to whether fraud had been practiced by plaintiffs in claiming to be United States Nationals (R. 50).

During the trial of that action evidence was offered and admitted to show that at Hong Kong, China, the appellants herein, gave to the American Consul written statements under oath to the effect that Ma Chuck Wun was not their blood brother. Appellants at the trial denied having made such written statements under oath, but later recanted.

Blood grouping tests of all three, Ma Chuck Moon, Ma Chuck Woon, and Ma Chuck Wun, with that of Ma Tarn Sun, were made but proved inconclusive without the blood of Wong Shee, which it was not possible to procure because Wong Shee was then in China behind the bamboo curtain. The trial of that case was concluded in April, 1954. The court in that case made a finding of fact as to Ma Chuck Wun as follows:

“From a consideration of all of the evidence, the

Court is not satisfied that plaintiff Ma Chuck Wun is the blood son of Ma Tarn Sun." (R. 54)

No such findings was made in that case concerning Ma Chuck Moon and Ma Chuck Woon.

The court did, however, make this finding:

"The Court further finds that the plaintiffs, Ma Chuck Moon and Ma Chuck Woon, having perjured themselves, are not entitled to have much credence given their testimony in this case, and cannot believe that Ma Tarn Sun was not fully cognizant at all times of this perjury by Ma Chuck Moon and Ma Chuck Woon, and can therefore place little credence on his testimony, and further the court finds that Exhibit A-19 is not entitled to any probative value."

As conclusions of law in that case:

"The evidence is insufficient to grant the relief prayed for and the action should be dismissed and defendant be entitled to judgment with costs." (R. 54)

The judgment entered was:

"Ordered, Adjudged and Decreed that plaintiffs' action herein be and the same is hereby dismissed." (R. 54)

Criminal informations were filed against Ma Chuck Moon and Ma Chuck Woon arising out of the perjury committed, to which appellants entered pleas of guilty and were sentenced to McNeil Island Penitentiary for terms of three and a half and two and a half years respectively, with time off for good behavior, which they served and have since been released.

While confined in the penitentiary, John P. Boyd, District Director of Immigration and Naturalization,

issued warrants of arrest, which were served on appellants May 12, 1955, and on November 21, 1955, under File No. A 8897118. The District Director, in writing, notified appellants to appear before him Monday, December 19, 1955, at 1:00 p.m., for a hearing to enable them to show cause why they should not be deported from the United States as aliens. In that notice it was stated:

“You are charged with being an alien illegally in the United States and subject to deportation upon the following grounds:

“Section 241(a) (4) of the Immigration and Nationality Act, in that, he has been convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement therefor in a prison or corrective institution for a year or more, to-wit: Perjury.” (R. 18)

This hearing has not yet been had, having been postponed by the Director pending final decision of the District Court in the instant case.

At the conclusion of the trial in the former case the court on April 30, 1955, made and entered findings of fact and conclusions of law, which are set out in the memorandum opinion in the instant case (R. 44), and did find on the first issue presented by the pretrial order to-wit: That *Ma Chuck Wun was not the blood son of Ma Tarn Sun*, but made no similar finding with respect to Ma Chuck Moon and Ma Chuck Woon, appellants herein. The District Court, however, did make findings to the effect that Ma Chuck Moon and Ma Chuck Woon had perjured themselves and that for that reason little credence could be given their testimony.

Of course on the issues of identity, neither Ma Chuck Moon nor Ma Chuck Woon could offer competent evidence establishing their own identity, but they were identified by Ma Tarn Sun, who was present in China when each was born and who did identify Ma Chuck Moon and Ma Chuck Woon as his blood sons. In its finding No. IV the court stated:

“The Court further finds that there is no credible evidence touching the identity of any of the persons called Ma Chuck Moon, Ma Chuck Woon and Ma Chuck Wun or that the persons named as plaintiffs, to-wit: Ma Chuck Moon, Ma Chuck Woon and Ma Chuck Wun, are the identical persons named in Finding III hereof, whose birth dates are set forth in said Finding III, other than self-serving declarations and the Immigration file of Ma Tarn Sun.” (R. 51)

Finding No. IX in that case reads:

“From a consideration of all of the evidence, the Court is not satisfied that plaintiff Ma Chuck Wun is the blood son of Ma Tarn Sun.” (R. 54)

STATEMENT OF THE CASE

The instant case was commenced in February, 1955, under Section 1503 (a) Title 8 U.S.C.A., *applicable only to persons within the United States* claiming American Nationality and a denial of those rights by the Secretary of State which was well within the one-year limitation fixed by Rule 60 (b), Federal Rules of Civil Procedure, in which a motion for relief from judgments may be filed and it would seem that under the original complaint herein filed by their father, Ma Tarn Sun, against Dean Acheson, John Foster Dulles,

as Secretary of State, having been substituted, may properly be considered as such a motion in the former case No. 2749, in the interest of justice, as appellants now have other witnesses as to identity not available in 1954.

However, thereafter, in May, 1955, John P. Boyd, as District Director of Immigration and Naturalization, issued and served warrants of arrest upon appellants while they were confined in McNeil Island Penitentiary serving sentences for perjury committed by them in that cause, *seeking to deport appellants as aliens*. An amended complaint was thereupon filed, pursuant to an order so authorizing, making the District Director a defendant and alleging as ground for declaratory relief against the Director of Immigration their claim to American Citizenship and the denial thereof by the Director of Immigration the issuance of warrants of arrest seeking deportation of appellants as aliens. This amended complaint was filed pursuant to order entered September 21, 1955 (R. 26).

On July 27, 1955, appellants filed a motion for summary judgment under Rule 56 (R. 13), attached to which is the affidavit of Ma Tarn Sun, in which he states he is an American Citizen and setting forth the dates of birth in China of his sons, Ma Chuck Moon and Ma Chuck Woon, the former on July 25, 1925, and the latter on September 12, 1933, and that he was present in China at each birth and remained in China for more than two years after the birth of both his sons Ma Chuck Moon and Ma Chuck Woon; that he returned to China again in 1947, where he visited his wife and these

two sons and on his return to the United States he made arrangements to have these two sons come to the United States by preparing an affidavit, which was subsequently filed with the American Consulate at Hong Kong, China, to obtain travel documents for his sons' travel to the United States; that appellants are the legitimate blood sons of himself and Wong Shee. He further stated in his affidavit, in support of appellants' motion to amend their complaint, that since appellants commenced their action for a declaratory judgment in February, 1955, the Immigration and Naturalization Director, John P. Boyd, caused to be served upon appellants warrants of arrest seeking their deportation; copies of said warrants are attached to his affidavit (R. 15).

No counter affidavit denying the sworn statement of Ma Tarn Sun has been served or filed by the United States Attorney and the *statements made in the affidavit of Ma Tarn Sun stand admitted*. They clearly and positively identify both Ma Chuck Moon and Ma Chuck Woon as his blood sons (R. 13-15).

The United States Attorney did, however, thereafter in August, 1955, file a motion for summary judgment, supported by the affidavit of F. N. Cushman, Assistant United States, stating he had personally examined the record in Cause No. 2749 and interposed the defense of *res judicata* (R. 22). Thereafter and on October 24, 1955, by order entered herein, Herbert Brownell, Jr., as Attorney General, was made an additional defendant, he being the head of the Department of Justice,

which includes the Immigration and Naturalization Service (R. 42-3).

On December 31, 1955, the court filed his memorandum opinion (R. 44) and thereafter Findings of Fact, Conclusions of Law and judgment were entered on January 27, 1956 (R. 62) after a prior hearing in which recent cases from this court and from the Supreme Court of the United States were cited to the court in supplemental memoranda, but the court stated *he did not care to hear further oral argument*. The court requested appellants' counsel to prepare and file Findings and Conclusions in accordance with appellants' theory of the case, which was done.

While the memorandum opinion filed by the trial court December 31, 1955, refers to the warrants of arrest for deportation of appellants, no mention whatever is made thereof in the Findings made and entered by the trial court, the decision of the District Court being that appellants may not maintain this action because the former action is *res judicata*. The District Court relied principally upon what we believe to be a misinterpretation of the holding in the case of *Acheson v. Furusho*, 212 F.2d 284, from this court, where the question of the applicability of Rule 25 (d) of the Federal Rules of Civil Procedure relating to the substitution of parties as officers of the United States within six months after a vacancy in office has occurred, which substitution was authorized by this court. The District Court entirely overlooked the real decision in that case, which was, as we interpret it, that Rule 25 (d) of the Federal Rules of Civil Procedure does not apply to the

cases of this nature, as substitution may be and was authorized by this court.

We contend that by the same process of reasoning by this court in the *Furusho* case, Rule 41 (b) of Federal Rules of Civil Procedure upon which the District Court so strongly relied to support its application of the doctrine of *res judicata*, is inapplicable to actions of this kind.

Notice of appeal to this court was filed February 7, 1956, and cost bond on appeal with cash deposit in the amount of \$250 was filed and lodged with the Clerk of the District Court the same day (R. 69-70).

The statute authorizing this proceeding under the Declaratory Judgment Act, is Section 1503 (a) Title 8, effective December 24, 1952, which reads:

“If any person who is within the United States claims a right or privilege as a National of the United States is denied such right * * * by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department * * * for a judgment declaring him to be a national of the United States * * *.”

The appellants were, when they commenced this action, and still are *persons who are within the United States claiming rights and privileges as Nationals of the United States* which have been denied them by the Director of Immigration and who come within the purview of this section. The claim to Nationality is contained in the amended complaint (R. 27) and in the af-

fidavits of Will G. Beardslee (R. 9) and Ma Tarn Sun (R. 13), neither of which in this proceeding anywhere is denied.

APPELLANTS' POINTS ON APPEAL

1. The District Court erred in granting defendants' motion for summary judgment of dismissal.
2. The District Court erred in denying plaintiffs' motion for summary judgment.
3. The District Court erred in dismissing plaintiffs' complaint on the ground of *res judicata*.

ARGUMENT

The statutes involved are Section 1503 (a) and 1251 (a) (4) Title 8 U.S.C.A. and Title 5, Secs. 1009, 1010 U.S.C.A.

Sec. 1503 (a) Title 8, reads:

“If any person who is within the United States claims a right or privilege as a National of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. * * *

The question in this case is as to whether nationals of

the United States who, while in the United States, invoke the provisions of Section 1503 (a) Title 8 U.S.C.A. under the declaratory judgment act may be prevented from establishing in a judicial proceeding their claim to American Nationality under the doctrine of *res judicata* because of a former judgment of dismissal for insufficiency of the evidence in an action instituted in their behalf while they were still in China, by their father, an acknowledged citizen, residing in the United States as their next friend under the provisions of former Section 903, Title 8 U.S.C.A., since repealed.

This case, it must be remembered, under the amended complaint, is not only against the Secretary of State, who was defendant in the former action, but also against the Attorney General of the United States and the District Director of Immigration and Naturalization, who seek to deport appellants as aliens for the sole reason that they were convicted of perjury arising out of their testimony in the former case and were committed to the penitentiary for more than a year, under the provisions of Sec. 241(a)(4) of the Immigration Act of 1940.

The crime for which they were convicted and sentenced was committed after the effective date of the Act of 1952.

The present Act is contained in Sec. 1251 (a) (4) Title 8 U.S.C.A.

In a recent case from the Court of Appeals for the District of Columbia, *Tom We Shung v. Brownell*, 227 F.2d 40, 41, involving exclusion the court there said:

“The present question, whether review may be

had on a complaint filed after the 1952 Act took effect, *is not res judicata, since it neither was or could have been decided in the previous suit, filed before the Act took effect.*” (Emphasis ours)

The court there, in a footnote, said:

“In this respect we disagree with *Heikkila v. Barber*, 9 Cir. 216 F.2d 497, certiorari denied 349 U.S. 927, 75 S.Ct. 769.”

In reversing the cases of *Wa Kay Suey, Wong Poo Sing*, and *Emily Wong*, all against Brownell, Attorney General, 227 F.2d 41, 42, the court there said:

“In December, 1952, the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C.A. Sec. 1101 *et seq.* had become effective. Section 403 (a) (42) 66 Stat. 280, repeals the Nationality Act of 1940. Section 360 (a) of the Act of 1952 provides in effect that if any person ‘who is within the United States’ claims a right as a National of the United States, and the right is denied upon ground that he is not a national, he may institute an action for a declaratory judgment, ‘except that no such action may be instituted in any case if the issue of such person’s status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceedings’ 66 Stat. 273, 8 U.S.C.A. Sec. 1503 (a).

“The question is whether the 1952 Act deprived the plaintiffs of their right under the 1940 Act to have the issue of their citizenship, which had arisen in exclusion proceedings, decided in actions for declaratory judgments. *We think not.*”

The United States Supreme Court in the case of

Shaughnessy, as District Director of Immigration and Naturalization v. Pedreiro, decided April 25, 1955, 75 S.Ct. 591, in dealing with a deportation order, said (p. 593, 75 S.Ct.):

“Relief was sought only against the District Director of Immigration and Naturalization for the District of New York. The District Court dismissed the petition on the ground that either the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party and should have been joined. This holding made it unnecessary for the District Court to pass upon another ground urged for dismissal, that the Immigration and National Act of 1952 precluded judicial review of deportation orders by any method except habeas corpus.

“The Court of Appeals reversed, rejecting both contentions of the Government (2 Cir.) 213 F.2d 768. In doing so it followed the court of appeals for the District of Columbia Circuit which had held that deportation orders entered under the 1952 Immigration Act can be judicially reviewed in actions for declaratory relief under Sec. 10 of the Administrative Procedure Act, *Rubenstein v. Brownell*, 92 U.S. App. D.C. 328, 206 F.2d 449, affirmed by an equally divided court, 346 U.S. 929, 74 S.Ct. 319, 97 L.ed. 421. But the Court of Appeals for the First Circuit has held that habeas corpus is the only way such deportation orders can be attacked. *Batista v. Nicolls*, 1 Cir. 213 F.2d 20. Because of this conflict among circuits and the contention that allowing judicial review of deportation orders other than by habeas corpus conflicts with *Heikkila v. Barber*, 345 U.S. 229, 73 S.Ct. 603, 97 L.ed. 972, we granted certiorari 348 U.S. 882, 75 S.Ct. 124.

“The *Heikkila* case, unlike this one, dealt with a deportation order under the Immigration Act of 1917. The Act provided that deportation orders of the Attorney General should be final, and had long been interpreted as precluding any type of judicial review except by habeas corpus.”

After discussing the *Heikkila* case, and pointing out the proper application of the word “final,” and that the *Heikkila* case was not controlling in the *Shaughnessy* case, said:

“The court carefully pointed out, however, that it did not consider whether the same result should be reached under the 1952 Immigration and Naturalization Act which took effect after *Heikkila* does not control this case and we must consider the effect of the 1952 Immigration and Naturalization Act on the right to judicial review under the Administrative Procedure Act.”

Concluding at p. 594 of 75 S.Ct. the court said:

“Our holding is that there is a right of judicial review of deportation orders other than by habeas corpus and that the remedy sought here is an appropriate one.”

The court rejected the Government’s contention that the Commissioner of Immigration and Naturalization is an indispensable party to an action for relief of this kind.

Section 1251 (a) (4) Title 8 (the 1952 Act, which was in effect when the former case was tried in 1954 and when the perjury was committed, reads:

“(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who * * *

“(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more * * *.”

The district court, in its memorandum decision (R. 55) in applying the doctrine of *res judicata*, said:

“In cause No. 2749 plaintiffs proceeded under Section 503 of the Nationality Act of 1940, 54 Statutes at Large, 1171, 8 U.S.C.A. Sec. 903 now repealed. Here plaintiffs are proceeding under the Act of June 27, 1952, c 477, Title III, Ch. 3 Sec. 360, 66 Stats. 273, being 8 U.S.C.A. Sec. 1503. So far as the issue here involved is concerned there is no material difference between former Section 903 and present Section 1503 * * *.

“In other words the same rights of plaintiffs were claimed to have been violated in the earlier action Cause No. 2749 by subordinates of the State Department whereas in the present action the rights are claimed to have been violated by subordinates of the Attorney General Department.” (R. 55-56)

This latter conclusion is hardly a correct statement.

In the present action appellants claim the right to remain in the United States because they are nationals and citizens of the United States, although born in China of a father who is a recognized citizen of the United States and a mother who is a citizen of China, while the District Director seeks to deport them as aliens. In the former case instituted by their father, as next friend, at a time when appellants were still in China, the father, Ma Tarn Sun, brought an action in their behalf for a judicial determination of their status

as American Nationals, which after trial was dismissed for alleged lack of sufficient evidence.

The District Court in that former case made a definite finding with respect to one of the plaintiffs in that case, to-wit: Ma Chuck Wun, but not as to the appellants here (see Findings V and IX as to Ma Chuck Wun, set out in the memorandum decision) (R. 44-51-54).

For its conclusion on the doctrine of *res judicata* the District Court relied largely on the case of *Acheson v. Furushu*, 212 F.2d 284, and Rule 41 (b) Federal Rules of Civil Procedure, and in connection with that case said:

“Under the reasoning of the court, applying it to the matter before us, any judgment that would have been found for the plaintiffs in the original action *would in reality be a judgment against the people of the United States* through a nominal defendant fixing the status of the plaintiffs.” (R. 59)

The *Furusho* case dealt with the question of abatement and the court said at p. 290:

“*In the first place the government may not be sued without its consent*, and it has been and still is a governmental policy to grant consent sparingly. *To enact a law making every suit against the head of a governmental department one virtually against the department over which he presides, would be widening the consent greatly.*

“Besides, it might well result in the direction of a successor to an ex-official to do what he believed to be contrary to his duties without the opportunity to defend his contentions. Other difficulties are easily conjured.

“Nevertheless, Congress tried it, as we have heretofore mentioned, by enacting the Act of February 8, 1899, 30 Stat. 822.” (Emphasis supplied) and at p. 292:

“In no case is there any hint of or expressed reason for extending the abatement doctrine to actions wherein the judgment merely adjudicates the nationality status of the plaintiff by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment while the adjudication of the plaintiff as a national of the United States under Sec. 903 of Title 8 U.S.C.A. would result in the cessation of the deprivation of the right or privilege which entitled the plaintiff to sue, it does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction.

“On the other hand, it is greatly to the interest of every official of the government and of every citizen of the country that, where questioned, the nationality of a person should meet with prompt settlement.”

At p. 295:

“We repeat: That because the intent of the Congress and of the Supreme Court in statutes and rules relating to abatement was and is to remedy the situation revealed in Boutwell, and that no reason is apparent for either the Congress or the Supreme Court to intend otherwise and because the reason for the statutes and court rules does not reasonably apply to Sec. 903 but is inconsistent with the situation found in Sec. 903 cases, neither the statutes nor the rules should be applied to proceedings under that section. And we hold this opin-

ion even if it would seem to appear from the face of the statute or rule that officer parties in Sec. 903 are not excepted."

The same may be said of Rule 41 (b) Federal Rules of Civil Procedure when applied to so important a matter as American citizenship.

A very recent decision by this court *Suda v. Dulles*, decided July 14, 1955, reported in 224 F.2d 908, 909, Chief Judge Denman quoted with approval language used by the Supreme Court in *Schneiderman v. Dulles*, 320 U.S. 118, 122, relating to citizenship, as follows:

"In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty, for it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men."

Again, this court in *Chin Chuck Ming v. Dulles* (decided September 6, 1955) 225 F.2d 849, 851, Chief Judge Denman quotes with approval the statement of the United States Supreme Court in *Kwock Jan Fat v. White*, 253 U.S. 454, 464, 40 S.Ct. 566, 570, 64 L.ed. 1010, as follows:

"It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen should be permanently excluded from his country."

In *Mah Ying Og v. McGrath* (C.A.D.C., 1950) 187 F.2d 199, it appears that an action under 903 Title 8 U.S.C.A. was dismissed on the ground of *res judicata*. The court there said (p. 200, 3rd par., second column):

“The record presents the anomaly of two conflicting judgments on the same point by different judges of the same court.”

It appears from that case that on May 30, 1940, appellant applied for admission into the United States on the ground that he was a son of a Native of the United States and therefore a citizen. His application was denied by a Board of Special Inquiry August 8, 1940, and by the Board of Immigration Appeals, November 27, 1940. He then sought relief by petition for Writ of Habeas Corpus filed in the United States District Court for the Northern District, Southern Division of California. His petition was denied and on appeal that denial was affirmed by this Court, January 9, 1942, *Ma Ying Og v. Wixon*, 124 F.2d 1015.

The case holds, however, that in a proceeding under 903, now 1503 T. 8 U.S.C.A. that appellant was entitled to a trial *de novo*.

It is stated by the court at page 201, 3rd paragraph, right hand column:

“The act as interpreted by the courts provides for a judicial declaration of the United States ‘Nationality’ or ‘Citizenship’ of persons claiming rights based upon such nationality or citizenship.
* * * This avenue for judicial determination of his citizenship is open to relator here.”

In *Ma Ying Og v. McGrath*, 187 F.2d 199, May Ying Og brought action under the Nationality Act of 1940, 503, 8 U.S.C.A. 903, against Howard McGrath, Attorney General of the United States, for a declaratory judgment that plaintiff is a citizen of the United States. A judgment dismissing the complaint was entered by

the United States District Court for the District of Columbia, and the plaintiff appealed. The Court of Appeals, Wilkin District Judge, held that the provision of the Immigration Act making the decision of a Board of Special Inquiry in exclusion of an alien final did not apply to action brought under Nationality Act to declare plaintiff a citizen where plaintiff was born in China of a parent claimed to be a native born American. Judgment reversed and remanded. 217 F.2d 142.

This court has held in *Southern Pac. R. Co. v. United States*, 133 F.2d 651, that a judgment of dismissal without prejudice is no bar to a subsequent suit on the same cause of action (affirmed 200 U.S. 34).

A decision in a prior case involving the same questions and subject matter and substantially the same parties, is not technically *res judicata* where the dismissal is without prejudice.

Krauthoff v. Kansas City, 31 Fed. 75, cert. den. 280 U.S. 583;

Port of Seattle v. Fid. & Dep. Co., 106 F.2d 277 (281).

The Immigration and Naturalization Service has recognized the father of these appellants, Ma Tarn Sun, as an American citizen and has also recognized Ma Chuck Moon and Ma Chuck Woon as the blood sons of Ma Tarn Sun and Wong Shee (R. 13).

In the case of *Fusae Yamamoto v. Dulles* (D.C., Hawaii, 1954) 16 F.R.D. 195, it was held (at page 198) that Section 1503 (a) of Title 8 did not change the statutory remedy of the declaratory judgment actions for persons within the United States and the parties plain-

tiff therefore could have filed individual actions after December 24, 1952, which was the effective date of Section 1503 (a) at page 199 the court said:

“Movants’ rights have not been taken from them but they must use the new procedure in order to establish their claims that they are nationals of the United States.”

See also *Lew Thun a/k/a Lee Yee Ching*, 16 F.R.D. 352, and *Acheson v. Furusho* (9th Cir., 1954) 212 F.2d 284.

It would seem too plain for argument, that so precious a right as American Citizenship can be denied under the doctrine of *res judicata* merely because the court in its findings, applied the incorrect rule on the *quantum* of proof. Any fraud that may have been attempted to be practiced by the father of the plaintiffs in an attempt to bring in another Chinese minor should not be visited upon these appellants.

In the case of *Espino v. Wixon* (9 Cir.) 136 F.2d 96, where a Mexican person residing in the United States and who had resided therein for several years asserted his citizenship in deportation proceeding and the evidence received therein would, if believed, support a finding that he was a native born citizen, the entry of an order denying writ of habeas corpus without a judicial trial on the issue of citizenship was error (8 U.S.C.A. 180).

The court said (p. 97):

“That a judicial trial of the issue of citizenship is necessary seems clear from the facts and the authorities. The act of deportation of a person from this country is authorized and enforced through an

executive proceeding. Appellant, like the applicants for a writ of habeas corpus in the case of *Ng Fung Ho v. White*, 259 U.S. 276, 282, 42 S.Ct. 492, 66 L.ed. 938, did not merely assert his citizenship of the United States and was not in the position of a person stopped at the border when seeking to enter this country. He was already in the United States and has resided therein for years, and he supported his claim to citizenship by evidence sufficient, if believed, to entitle him to a finding of citizenship." In the cited case the following question was posed:

"*Does the claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of his claim?*"

"The court suggests other points not necessary at this time to be noted and says (page 284 of 259 U.S. p. 495 of 42 S.Ct. 66 L.ed. 938): 'Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus denial of an essential jurisdictional fact. * * * If the jurisdiction of the Department of Labor (then in charge of immigration proceedings) may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously *deportation* of a *resident* may follow upon purely executive order, whatever his race or place of birth; for where there is jurisdiction, a finding of fact by the executive department is conclusive, *United States v. Ju Toy*, 198 U.S. 253, 25 S.Ct. 644, 49 L.ed. 1040; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow v. United States*, 208 U.S. 8, 28 S.Ct. 201, 52 L.ed. 369, or the

finding was not supported by evidence, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 23 S.Ct. 33, 47 L.ed. 90. * * * *To deport one who so claims to be a citizen, obviously deprives him of liberty as was pointed out in Chin Yow v. United States*, 208 U.S. 8, 13, 28 S.Ct. 201, 52 L.ed. 369. * * * Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States v. Woo Jan*, 245 U.S. 552, 556, 38 S.Ct. 207, 62 L.ed. 90, 93, 40 S.Ct. 449, 64 L.ed. 797."

In *Furusho, supra*, after discussing the question of abatement the court (p. 290) said:

"In the first place, the government may not be sued without its consent, and it has been and still is a governmental policy to grant consent sparingly. To enact a law making every suit against the head of governmental department one virtually against the department over which he presides, would be widening the consent greatly.

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binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment, while the adjudication of the plaintiff as a national of the United States under Sec. 903 of Title 8 U.S.C.A. would result in the cessation of the deprivation of the right or privilege which entitled the plaintiff to sue, it does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction. On the other hand, it is greatly to the interest of every official of the government and of every citizen of the country that, where questioned, the nationality of a person should meet with prompt settlement."

At p. 295:

"We repeat: That because the intent of the Congress and of the Supreme Court in statutes and rules relating to abatement was and is to remedy the situation revealed in *Boutwell*, and that no reason is apparent for either the Congress or the Supreme Court to intend otherwise, and because the reason for the statutes and court rules does not reasonably apply to Sec. 903 but is inconsistent with the situation found in Sec. 903 cases, neither the statutes nor the rules should be applied to proceedings under that section. And we hold this opinion even if it would seem to appear from the face of the statute or rule that officer-parties in Sec. 903 are not excepted."

The same may be said of Rule 41(b).

The basic ground upon which the district court botomed its decision in this case was the doctrine of *res judicata*.

That doctrine is applicable, as we understand it, only

where the parties are the same and similar relief is sought. The first suit was brought by Ma Tarn Sun, appellants' father, as next friend, in 1951 while appellants were still in China under a statute authorizing that procedure, but was not tried for nearly two years after appellant's arrival at Seattle, through no fault of appellants.

The district court, in its memorandum decision, hereinafter referred to quotes its finding No. II, in Cause No. 2749, as follows:

"That as the result of a pretrial conference held the 7th day of January, 1954, the issues were confined to the question of identity of the plaintiffs as being the blood sons of Ma Tarn Sun and Wong Shee, and as to whether there was fraud practiced by plaintiffs in claiming to be United States Nationals." (R. 50)

A trial of that action was commenced in January, 1954, at which Ma Chuck Moon and Ma Chuck Woon each denied they had, under oath while being examined by a United States Vice Consul, executed and signed written statements to the effect that Ma Chuck Wun was not their blood brother; a continuance was requested by the United States Attorney to enable defendant to bring the Vice Consul before whom these statements were made, to testify in the case concerning that matter.

Upon the arrival of the Vice Consul in April, 1954, the trial was resumed. The appellants herein each took the stand and admitted that they, and each of them, had in fact written and signed these affidavits in which they stated that Ma Chuck Wun was not their blood

brother. The Vice Consul identified Ma Chuck Moon and Ma Chuck Woon as the persons who appeared before him in Hong Kong and under oath, swore to the truth of the statements contained therein and that he personally took their acknowledgements.

The present action was brought under the Nationality Act of 1952 (Sec. 1503 (a) Title 8 U.S.C.A., *applicable only to persons in the United States*, while the former action was instituted under former Section 903 Title 8 U.S.C.A., since repealed, applicable only to persons in a foreign country claiming American Nationality and Citizenship.

By their amended complaint in this case the appellants allege that they have, while lawfully in the United States, been denied rights and privileges of American Citizens by the Director of Immigration and Naturalization in that they have been *arrested as aliens* for deportation for the crime of perjury. The Director of Immigration has postponed hearing from time to time awaiting the district court decision in this case. The district court has made findings of fact, conclusions of law and entered a judgment dismissing their amended complaint on the sole ground of *res judicata*, holding, in effect, that appellants' action is one against the United States.

The United States has not consented to be sued in such cases.

We have found no case which has held the doctrine of *res judicata* applicable to citizenship cases. On the contrary, in the case of *Tom We Shung v. Brownell*, 227 F.2d 40, 41, we find this expression:

“The present question, whether review may be had on a complaint filed after the 1952 Act took effect is *not res judicata*, since it neither was or could have been decided in the previous suit filed before the Act took effect.”

So it is here. The District Director of Immigration is by the issuance of warrants of arrest of appellants seeking to deport appellants as aliens and, with the district court's permission, has been made a defendant herein (R. 26).

The Director of Immigration has chosen to defer a hearing on his warrants of deportation, pending the final determination of this action. It is alleged in the amended complaint that the Immigration Service has for thirty years recognized the father of appellants as an American Citizen, which is nowhere denied (R.13). In fact in the pretrial order such admission was made in the former case (R. 50, Finding II).

It is therefore respectfully submitted that the judgment of dismissal should be reversed and under the showing made, appellants adjudged by this Court to be Nationals of the United States of America.

Respectfully submitted,

WILL G. BEARDSLEE

Attorney for Appellants



No. 15041

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Court of Appeals
FOR THE NINTH CIRCUIT

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Appellants,

VS.

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HERBERT BROWNELL, JR., Attorney
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and JOHN P. BOYD, District
Director of Immigration and Naturalization,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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FILED
JUN 11 1956



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No. 15041

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

MA CHUCK MOON and MA CHUCK WOON,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of
State of the United States;
HERBERT BROWNELL, JR., Attorney
General of the United States;
and JOHN P. BOYD, District
Director of Immigration and Naturalization,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by the provisions of Section 1503(a), Title 8, U.S.C. and Section 2201, Title 28, U.S.C., and on this Court by Section 1291, Title 28, U.S.C.

STATUTES INVOLVED

The statutes involved are the Immigration and Nationality Act of 1952, Section 360, 66 Stat. 273, 8 U.S.C. 1503(a); the Nationality Act of 1940, Section 503, 54 Stat. 1171, 8 U.S.C. 903; and Rule 41(b), Federal Rules of Civil Procedure.

The applicable portions of the statutes are set forth in pertinent detail in appellees' Argument herein.

STATEMENT OF THE CASE

The appellants herein brought a prior action bearing cause No. 2749 against the Secretary of State of the United States under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903 (R. 50). Judgment was entered against appellants in that case on April 30, 1954.

Under the pleadings of the action, Ma Chuck Moon and Ma Chuck Woon (appellants herein) asserted derivative United States citizenship by virtue of Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition (R. 48, 49). As the plaintiffs' claim to derivative citizenship relied upon their alleged relationship to Ma Tarn Sun, who they claimed was their father, the issues in the case were confined to the question of identity of the plaintiffs as being the blood sons of Ma Tarn Sun and his wife and as to whether there was

fraud practiced by plaintiffs in claiming to be United States nationals (R. 50). The purpose of the action was to secure a declaratory judgment declaring the plaintiffs to be citizens and nationals of the United States (R. 29, 30, 32, 56, 57).

The action was tried before the District Court for the Western District of Washington, Northern Division. The plaintiffs were permitted to enter the United States from Hong Kong, British Crown Colony, for the purpose of prosecuting the action. Testimony was taken and evidence offered and admitted (R. 50, 51).

The court in its findings of fact found that plaintiffs Ma Chuck Moon and Ma Chuck Woon had perjured themselves in testifying at the trial, and subsequently ordered the case dismissed for lack of sufficient evidence (R. 53, 54). Plaintiffs were subsequently convicted for committing perjury, and were sentenced to the federal penitentiary at McNeil Island for terms of three and one-half and two and one-half years, respectively, with time off for good behavior, which they have served.

Appellants filed an action on February 2, 1955, in the District Court for the Western District of Washington, Northern Division, for a declaratory judgment under Section 360, Immigration and Nationality Act

of 1952, 8 U.S.C. 1503(a), 66 Stat. 273. The purpose of the action was to secure a declaratory judgment declaring the plaintiffs (appellants herein) to be citizens and nationals of the United States (R. 5, 30, 56, 57). This action was originally brought against John Foster Dulles, the Secretary of State of the United States. Subsequently, the District Director of Immigration and Naturalization instituted deportation proceedings against Ma Chuck Moon and Ma Chuck Woon seeking to deport them as aliens who had been convicted of a crime involving moral turpitude within five years after entry. The District Director was then added as a party defendant (R. 17, 18, 19, 20, 26, 27). Thereafter the Attorney General of the United States was also added as a party defendant (R. 43, 44).

Both parties herein filed motions for summary judgment, and oral argument was heard on the motions of both parties on October 24, 1955. On October 25, 1955, plaintiffs' attorney filed a memorandum suggesting that under Rule 21, Federal Rules of Civil Procedure, the Secretary of State might be dropped as a party defendant, under the apparent belief that the doctrine of *res judicata* would not be applicable where the parties were not the same. The court made no decision of the matter for the reason that its disposition of the case did not necessitate a

decision on the question of dropping the Secretary of State as a party defendant (R. 47).

On January 27, 1956, the court entered its judgment of dismissal upon defendants' motion for summary judgment, for the reason that the action was barred by application of the doctrine of *res judicata* (R. 66, 67, 68, 69).

QUESTIONS PRESENTED

1. Is a judgment of dismissal for lack of sufficient evidence, entered after trial upon the merits and without qualification as to prejudice, a judgment upon the merits for the purposes of applying the doctrine of *res judicata*?

2. Does application of the doctrine of *res judicata* bar an action for declaratory judgment instituted under the provisions of 8 U.S.C. 1503(a) after an adjudication on the merits against the plaintiffs in an action for declaratory judgment under the provisions of 8 U.S.C. 903?

SUMMARY OF ARGUMENT

Appellants argue that a judgment rendered against them in a suit for declaratory judgment of their alleged citizenship under the provisions of 8 U.S.C. 903, which was dismissed for lack of suffi-

cient evidence after a trial upon the merits and without qualification as to prejudice, is not a bar to a subsequent action for declaratory judgment of their alleged citizenship under the provisions of 8 U.S.C. 1503(a), which action is the subject of this appeal.

The appellees contend that the judgment of dismissal rendered against appellants in the prior action operates as an adjudication upon the merits and that said dismissal is a bar to the action now before the Court on appeal.

Appellants litigated the issue of their citizenship in an action for declaratory judgment brought under the provisions of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903. No appeal having been taken from the judgment in that case, it became final as to the parties therein and their privies. The present action was subsequently brought to relitigate the status of appellants' citizenship under the provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503(a). The issues in both cases were, therefore, the same. Both actions were brought against officers of the United States Government, and both were, in effect, suits against the United States. Although the action herein appealed is purportedly brought under the Immigration and Nationality Act of 1952 rather than the Nationality Act of 1940, it is nevertheless

barred by reason of application of the doctrine of *res judicata*.

ARGUMENT

I.

Was the judgment entered against appellants in cause No. 2749 an adjudication upon the merits for the purposes of applying the doctrine of res judicata?

Appellants argue that a judgment of dismissal without prejudice is no bar to a subsequent suit on the same cause of action. It is conceded that appellants' statement of the rule is correct. But, as a brief analysis of the facts and applicable law will demonstrate, cause No. 2749 was dismissed with prejudice, and the judgment therein is a bar to this action.

Judgment was entered against the appellants in cause No. 2749 (Western District of Washington, Northern Division) on April 30, 1954, said judgment dismissing the action without qualification. No timely appeal was taken therefrom (R. 32). The judgment of dismissal was entered after a trial upon the merits, the dismissal being for lack of sufficient evidence. Certified copies of the Findings of Fact, Conclusions of Law and Judgment were attached to and incorporated in appellees' affidavit in support of motion for

summary judgment (R. 31 through 41). The affidavit was not controverted.

Rule 41(b), Federal Rules of Civil Procedure, provides in part:

"If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Emphasis supplied).

Judgment on the merits was rendered in cause No. 2749, as the court specifically held in its findings of fact herein (R. 66). Said judgment, having been rendered on the merits, is a bar to a subsequent action involving the same issues and the same parties and their privies.

"Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 30 Am. Jur., Judgments, § 161, p. 908.

The rule as thus summarized has received the recognition and support of the Supreme Court of the United States and this Court.

Hatchitt v. United States, 158 F. 2d 754 (C.A. 9 1946);

MacDonnell v. Capital Co., 130 F. 2d 311, cert. denied 317 U.S. 692 (C.A. 9 1942);

Chicot County Drainage District v. Baxter State Bank et al., 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940);

Dern v. Tanner, 96 F. 2d 401, cert. denied 305 U.S. 621 (C.A. 9 1938);

Grubb v. Public Utilities Commission, 281 U.S. 470, 74 L.Ed. 972, 50 S.Ct. 374 (1930);

Johnson Steel Street-Rail Co. v. Wharton, 152 U.S. 252, 38 L.Ed. 429, 14 S.Ct. 608 (1894).

It is clear that under the provisions of Rule 41(b), Federal Rules of Civil Procedure, the prior adjudication in cause No. 2749 operates as an adjudication upon the merits, and that said judgment is conclusive as to subsequent actions, such as the present one, where the issues are the same as in the prior case and the parties are the same or are in privity with one another.

Rule 41(b) is sufficiently broad to include judgments rendered on the basis of insufficient evidence, but even without the benefit of the rule the courts have applied the doctrine of *res judicata* where judgment has been based on the insufficiency of the evidence.

It is stated in 30 Am. Jur., Judgments, § 213, p. 948:

“The general rule is that a judgment, in a former action, based upon an insufficiency of evidence is sufficient to support the application of the doctrine of *res judicata*.”

The rule as quoted was cited and applied by the Supreme Court of Appeals of Virginia in *Patterson v. Saunders*, 194 Va. 607, 74 S.E. 2d 204, 207 (1953), and certiorari was thereafter denied by the Supreme Court of the United States, 345 U.S. 998, 97 L.Ed. 1405, 73 S.Ct. 1132.

It is submitted that the lower court in the instant case correctly concluded that no appeal having been taken from the judgment of dismissal for lack of sufficient evidence, the judgment became final as to the issues and parties therein (R. 66, 67).

II.

Does application of the doctrine of res judicata bar an action for declaratory judgment brought under the provisions of 8 U.S.C. 1503(a) after an adjudication on the merits against plaintiffs in an action for declaratory judgment under the provisions of 8 U.S.C. 903?

The action herein the subject of appeal is the second action initiated by plaintiffs against officers of the United States for declaratory judgment declaring their rights of citizenship and nationality. The

first action, cause No. 2749, Western District of Washington, Northern Division, was brought under the provisions of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903 (R. 64). That section in pertinent part provides:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States.”

In the action under the above statute, the plaintiffs alleged that the American Consul General in Hong Kong refused to recognize them as citizens or nationals of the United States and denied them the right to enter the United States. As the American Consul General in Hong Kong is an executive official of the Department of State, John Foster Dulles, the Secretary of State, was named as party defendant, he being the head of said department (R. 55, 56).

In the said action, plaintiffs Ma Chuck Moon and Ma Chuck Woon perjured themselves, and the court,

attaching little, if any, weight to the testimony offered on behalf of plaintiffs, dismissed the action for insufficient evidence.

Appellants subsequently filed an action under Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503(a), for a declaratory judgment declaring their alleged status as citizens and nationals of the United States (R. 29, 30). Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503(a), is the counterpart, with changes immaterial here, of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, now repealed. *Samaniego v. Brownell*, 212 F. 2d 891 (C.A. 5 1954).

In part, 8 U.S.C. 1503(a) provides:

“If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, * * *.”

Appellants' action under Section 360 of the Immigration and Nationality Act of 1952 sought the

same adjudication as was sought in the prior action under Section 503 of the Nationality Act of 1940 . . . a declaratory judgment of their status as nationals and citizens of the United States. Such actions are authorized under the provisions of both Acts. *Acheson v. Fujiko Furusho*, 212 F. 2d 284 (C.A. 9 1954); *Samaniego v. Brownell*, 212 F. 2d 891 (C.A. 5 1954); *Avina v. Brownell*, 112 F. Supp. 15 (U.S.D.C. Texas, S.D. 1953). From the foregoing it is apparent that the actions, although instituted under different Acts, involved the same issues (R. 56, 66, 67).

The fact that the action herein appealed was instituted against the Attorney General of the United States and the District Director of Immigration and Naturalization as well as the Secretary of State does not remove the action from within the scope of the doctrine of *res judicata*. The prior action under the Act of 1940 as well as the subsequent action under the Act of 1952 are both, in effect, suits against the United States. This for the reason that there is privity between officers of the same government.

“There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.”

Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402, 84 L.Ed. 1263, 60 S.Ct. 907 (1940).

For other decisions in accord, see

Tait v. Western Md. Ry. Co., 289 U.S. 620, 77 L.Ed. 1405, 53 S.Ct. 706 (1933);

Estevez v. Nabers, 219 F. 2d 321 (C.A. 5 1955);

DiSilvestro v. Gray, 194 F. 2d 355, cert. denied 343 U.S. 930, 72 S.Ct. 765, rehearing denied 343 U.S. 952 (C.A. D.C. 1952);

United States v. Willard Tablet Co., 141 F. 2d 141 (C.A. 7, 1944).

The rule relating to privity among government officials applies in actions brought under 8 U.S.C. 903, as was indicated in *Acheson v. Fujiko Furusho*, 212 F. 2d 284 (C.A. 9, 1954). That decision was rendered in connection with several cases which were before this Court on motions to dismiss for failure to comply with the provisions of Rule 25(d) of the Federal Rules of Civil Procedure relating to the substitution of parties as officers of the United States within six months after a vacancy in office has occurred, the occasion in that case being the succession of John Foster Dulles to Dean Acheson as Secretary of State. The Court considered the nature of actions brought under 8 U.S.C. 903 at length, and in pertinent part, at Page 292 of the decision, observed as follows:

“In no case is there any hint of or expressed reason for extending the abatement doctrine to actions

wherein *the judgment merely adjudicates the nationality status of the plaintiff which, by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment.*" (Emphasis supplied).

Again, on page 296 of the same opinion, it is stated:

"In summation, also, we repeat that since a judgment rendered in a § 903 action cannot be a command to any head of any governmental department to do anything or to refrain from doing anything, *but fixes a status for the plaintiff which all persons inclusive of governmental authorities must respect*, the action does not relate to the 'discharge', i.e., the carrying out, of any official duty." (Emphasis supplied).

From the foregoing, it is clear that the adjudication upon the issue of the appellants' status as citizens in cause No. 2749 under the provisions of 8 U.S.C. 903 *was binding on all government officials, they being in privity with one another*, including the appellees.

It is submitted that the issues presented in the case now before this Court on appeal, having been previously adjudicated in cause No. 2749 of the District Court for the Western District of Washington, which prior action involved the same parties or their privies, are now barred from further litigation by application of the doctrine of *res judicata*.

The purpose of applying the doctrine of *res judicata* has been stated with clarity in *Hatchitt v. United States*, 158 F. 2d 754 (C.A. 9 1946), at page 757 of the opinion, by Judge Garrecht for the Court:

“The appellants misconceive the nature of the doctrine of *res judicata* when they characterize it as a ‘highly technical defense.’ In 30 Am. Jur., Judgments, § 165, it is said: ‘The doctrine of *res judicata* may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of *res judicata*, would be endless. The doctrine of *res judicata* rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of *res judicata* not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings.’ ”

It would seem that the present case is one where in the rationale of the Court, as set forth by Judge Garrecht, *supra*, is applicable. Appellants, having once presented the issues of their status as citizens and nationals of the United States for judicial determination, should not be permitted to relitigate said issues by bringing another action against defendants, who are different nominally but are nevertheless bound by

the prior judgment. The court below, having once adjudicated the matter before it, recognized the principle and properly applied the doctrine of *res judicata*.

III

Appellants' Argument

Appellants argue that the District Court erred in denying plaintiff's motion for summary judgment, and recite in their brief that the affidavit of Ma Tarn Sun submitted in support of said motion has never been denied. They argue further that the statements contained in the affidavit therefore stand admitted.

The lower court's disposition of the action on the ground of *res judicata* invalidates the argument . . . as consideration of appellants' (plaintiffs below) motion was rendered unnecessary by the court's entering its judgment of dismissal on the ground of *res judicata*. An action may be properly disposed of by judgment of dismissal on the ground of *res judicata* upon motion for summary judgment. *Daley v. Sears, Roebuck & Co.*, 90 F. Supp. 562, affirmed 182 F. 2d 347 (C.A. 6, 1950); *Hatchitt v. United States*, *supra*.

Appellants' argument that the lower court erred in denying their motion for summary judgment in view of the uncontradicted affidavit in support thereof is invalid for still another reason . . . the District

Court was not required to believe such evidence or accept it as true, even though uncontradicted. *Brownell v. Lee Mon Hong*, 217 F. 2d 140 (C.A. 9, 1954). In view of the particular background of this case, the lower court could very well have declined to grant the appellants' motion for summary judgment, even if the appellees had not interposed the defense of *res judicata*.

That portion of appellants' argument relating to the applicability of the doctrine of *res judicata* has, we believe, been adequately answered in Arguments I and II of our brief, although it may be of some worth to discuss briefly the authorities cited in appellants' brief.

Appellant's reliance on *Tom We Shung v. Brownell*, 227 F. 2d 40 (C.A. D.C. 1955), is not well taken, as that case specifically holds the doctrine of *res judicata* to be inapplicable because the issue before the court had not been previously decided, which holding is contrary to the facts in the present appeal.

Additionally, *Tom We Shung v. Brownell* relates to the right of appellant therein to judicial review of an order of exclusion. The issue before this Court is not whether appellants are entitled to judicial review, but rather one of whether, once having had a judicial determination of their status as citizens, they can again present the same issue to the Court for further

litigation. *Mah Ying Og v. McGrath*, 187 F. 2d 199 (C.A. D.C. 1950), is likewise not in point. That case holds that a judgment in habeas corpus proceedings, upholding the denial by Immigration Service officials of entry into the United States by the appellant therein, not to be a bar of a subsequent action under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903. The reason for such a holding is clear . . . the remedy afforded by habeas corpus is limited to judicial review, while an action under Section 503 requires a trial *de novo*. In the subject case appellants have had recourse to judicial determination in a trial *de novo*, a deciding fact not present in the cited case.

In *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C.A. D.C. 1955), and the cases presented together therewith, the issue before the Court was whether appellants therein were entitled to prosecute an action under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, after the effective date of the repeal of that act by the Immigration and Nationality Act of 1952. The Court held the actions survived, in view of the savings clause in the latter act. *Again*, there had been no prior judicial determination of the appellants' status as citizens or nationals of the United States, a fact not present in the subject case which distinguishes it from the cases cited.

While we do not believe that appellants' assertion on page 20 of appellants' brief, relating to recognition by the Immigration and Naturalization Service of the relationship between appellants and Ma Tarn Sun is pertinent to this appeal, it should be noted that the assertion is not in accord with the transcript of record as cited, or the facts of the case. Insofar as we know, the Immigration and Naturalization Service has had no occasion to recognize the appellants as the blood sons of Ma Tarn Sun. The issue may conceivably be raised in some future deportation proceedings against the appellants which would be subject to judicial review, but the issue is not before the Court here.

CONCLUSION

Clearly, the appellants herein have had a full opportunity to prosecute the issue of their status as citizens and nationals of the United States, and have done so. No appeal having been taken from the judgment in cause No. 2749, that judgment became final as to the parties therein and their privies. The subsequent action, herein the subject of appeal, involves the same issues and the same parties and their privies as cause No. 2749; the latter action is now barred from further prosecution by application of the doctrine of *res judicata*.

For the above reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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United States Attorney

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No. 15041

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS' REPLY BRIEF

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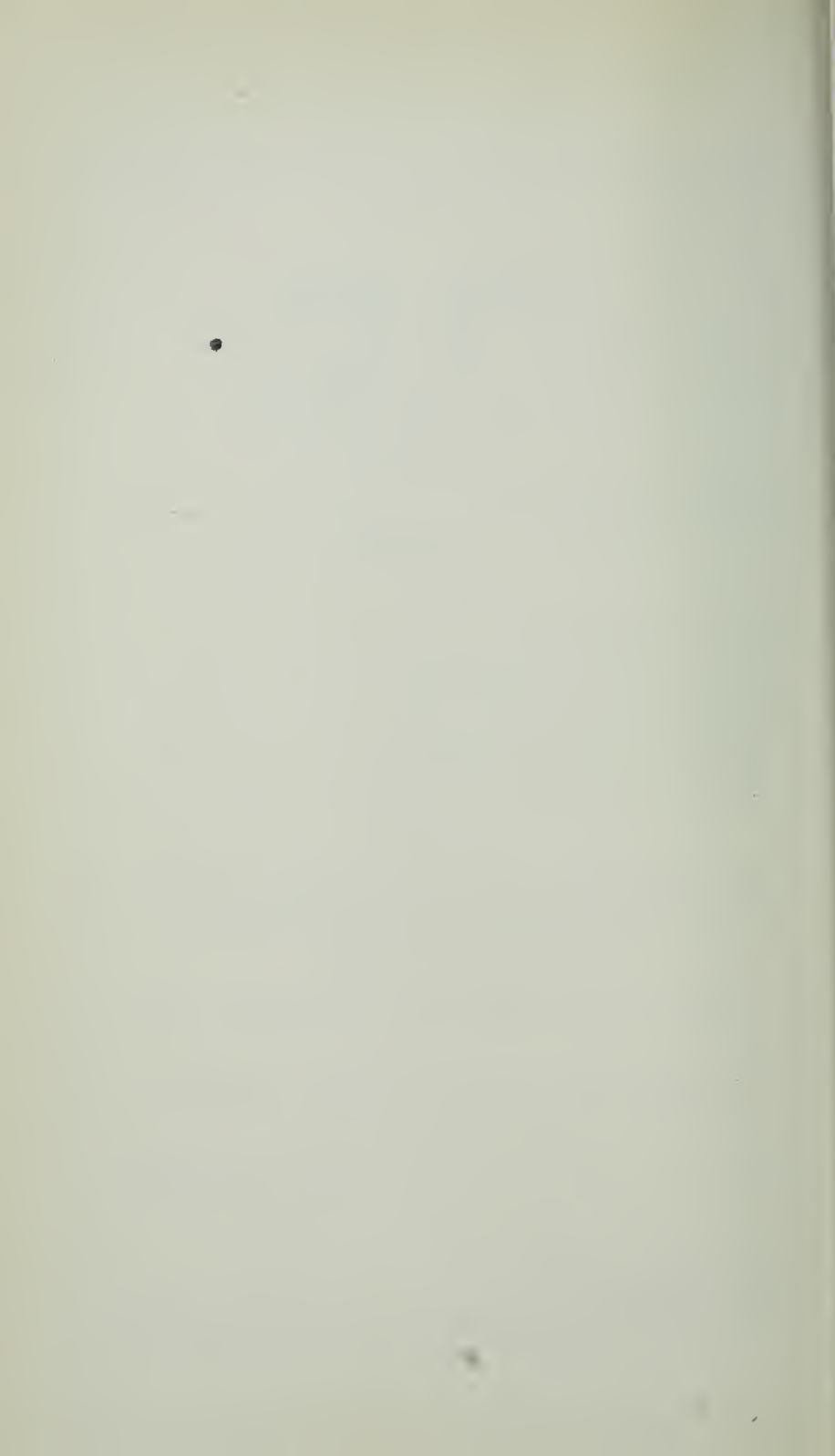
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APPELLANTS' ANSWERING ARGUMENT

In Appellees' statement of the case the impression is given that this appeal involved *Ma Chuck Wun*, as well as Ma Chuck Moon and Ma Chuck Woon, which is not true.

This appeal concerns only Ma Chuck Moon and Ma Chuck Woon.

Appellees properly pose the questions presented, which are: As applied to the former action:

1. Is a judgment of dismissal for lack of sufficient evidence, entered after trial on the merits and without qualification as to prejudice, a judgment on the merits for the purpose of applying the doctrine of *res judicata*?
2. Does application of the doctrine of *res judicata* bar an action for declaratory judgment instituted under the provisions of 8 U.S.C. 1503(a) after an adjudication on the merits against the plaintiffs in an action for declaratory judgment under the provisions of 8 U.S.C. 903?

These are the only questions involved. The judgment of dismissal here is predicated on the doctrine of *res judicata* based upon Rule 41 (b) Federal Rules of Civil Procedure, which so far as here pertinent reads:

“* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction* or for improper venue, operates as an adjudication on the merits.”

and upon the provisions of Rule 56, Rules of Civil Procedure.

(1) *An involuntary dismissal should not be ordered, if on the facts it appears that any relief could be granted.* (Barron v. Holtzoff, p. 641).

Dipson Theatres v. Buffalo Theatres, 8 F.R.D. 461.

Here, we have affidavits, which are not denied by any of the appellees unequivocally setting forth facts of birth and identity of appellants as American Nationals who have brought an action under an entirely new statute (Sec. 1503 (a) Title 8) applicable only to those persons within the United States in which it is claimed and nowhere denied the Director of Immigration *seeks to deport as aliens*, without any counter affidavits whatever.

(2) On the second proposition the doctrine of *res judicata*, we have argued this question fully in our opening brief and will burden the court no further except to say that after a painstaking and careful search of the adjudicated cases we have found no case where the doctrine of *res judicata* has ever been applied to a case involving the nationality status of Americans born abroad.

It is respectfully submitted that this appeal involves an entirely different situation than existed in the former action. Then there was no threat of deportation of appellants as aliens, while here, under the

pleadings we assert appellants are entitled to prove in the district court that they are American Nationals to prevent the Immigration Service from deporting them to China, and as they have already shown by affidavit of their father and that affidavit has not been controverted in any manner they should in equity and good conscience be adjudged American Nationals on the showing made.

Besides, in the former case, there was no affirmative finding that they were not who they claimed to be.

It is therefore respectfully submitted that the court erred in refusing to grant appellants' motion for summary judgment and in granting summary judgment of dismissal in favor of appellees.

Respectfully submitted,

WILL G. BEARDSLEE
Attorney for Appellants

No. 15041

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

MA CHUCK MOON and MA CHUCK WOON,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States; HERBERT BROWNELL, JR.
Attorney General of the United States, and
JOHN P. BOYD, District Director of
Immigration and Naturalization,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING OR
HEARING *EN BANC*

WILL G. BEARDSLEE
Attorney for Appellants

OFFICE AND POST OFFICE ADDRESS:
1201 NORTHERN LIFE TOWER
SEATTLE 1, WASHINGTON



No. 15041

IN THE
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IN THE
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⁴
UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING OR
HEARING *EN BANC*

The decision in this case is apparently bottomed on the original and *not the amended complaint*, by which John P. Boyd, District Director of Immigration and Naturalization was brought into the case.

The respondent Boyd issued warrants of arrest for each of the appellants seeking their deportation as *aliens* for having committed perjury in the former case.

The amended complaint joining the District Director of Immigration and Naturalization as a party defendant alleges that plaintiffs have been *denied by said Director* rights and privileges as American Nationals (R. 29) in that he has issued warrants of arrest for deportation, charging plaintiffs as follows:

“Whereas, from evidence submitted to me, it appears that the alien (Ma Chuck Moon), Ma Chuck Woon, who entered this country at Seattle, Washington, on the 9th day of September, 1952, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to-wit: Section 241(a)(4) of the Immigration and Nationality Act, in that he has been convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement therefore in a prison or corrective institution for a year or more, to-wit, Perjury.” (R. 18)

Plaintiffs on July 29, 1955, moved for summary judgment. (R. 13) Defendants moved for summary judgment September 21, 1955, *under the amended complaint* (R. 30), and it was error for the Court to deny appellants' motion.

To deny plaintiffs their day in court is to deny them rights vouchsafed them under the Fifth Amendment to the Constitution of the United States.

The denying of a judicial remedy to a citizen in a controversy affecting his citizenship, otherwise judiciable, would be in violation of the Fifth Amendment to the Constitution.

Tijerina v. Brownell, 141 F. Supp. 266 (Tex.), citing *Acheson v. Yeeking Gee* (9 Cir.) 184 F. 2d. 134, and *Acheson v. Mariko Kuniyuki* (9 Cir). 189 F. 2d 741.

STARE DECISIS

In the opinion filed in the instant case on October 1, 1956, written by Judge Orr and concurred in by Judges Pope and Fee, the writer of the opinion without making any reference whatsoever to the Furusho case said (p. 3 slip sheet) :

“We find no merit in the contention of appellants that since there is a difference in the parties named in No. 2749 and No. 3870, *res judicata* does not apply. The first action was brought by Ma Tarn Sun on behalf of Moon and Woon; however they were in fact plaintiffs there as they are here. In No. 2749 the action was against the Secretary of State, and in No. 3870 the Attorney General of the United States was defendant. This difference is not sufficiently material as to prevent the application of *res judicata*. No. 2749 and No. 3870 are in effect suits against the United States.”

The opinion goes on to quote from the case of *Sunshine Coal Co. v. Adkins*, (1940) 310 U.S. 381, 402, 60 S.Ct. 907, 84 L.Ed. 1263, in which it was held there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.

That case, we assert, neither raised nor discussed any denial of a constitutional right and is the highest authority for the questions there raised which are entirely foreign to the constitutional question raised by appellants against the District Director of Immigration and Naturalization and the Attorney General of the United States *who seek to deport appellants as aliens* while appellants claim and have by affidavit of their father established without any denial on the part of any of the appellees and particularly the Director of Immigration and Naturalization and the Attorney General that they are in fact American Nationals and entitled under the Constitution to have their day in court on that defense to the deportation proceedings instituted against them.

In *Espino v. Wixon* (9 Cir.) 136 F. 2d 96.

Judge Orr, who wrote the opinion in the instant case and who with Judge Pope sat on the *en banc* case

of *Acheson v. Furusho*, 212 F. 2d 284, the personnel of which sat thereon consisted of Chief Judge Denman and Judges Stevens, Healy, Bone, Orr and Pope, in refuting the claim of the United States Attorney that the *Furusho* and other cases under consideration were in fact suits against the government said: (p. 290)

"In the first place the government may not be sued without its consent and it has been and still is a governmental policy to grant consent sparingly. To enact a law making every suit against the head of a governmental department virtually against the department over which he presides, would be widening the consent greatly.

"Besides, it might well result in the direction of a successor to an ex-official to do what he believed to be contrary to his duties without the opportunity to defend his contentions. Other difficulties are easily conjured."

After much research we have been unsuccessful in finding any adjudicated citizenship case in which the doctrine of *res judicata* has ever been applied but, as stated at page 26 of our opening brief, in the case of *Tom We Shung v. Brownell*, 227 F. 2d 40, 41, we find this expression:

"The present question whether review may be had on a complaint filed after the 1952 Act took effect, is not res judicata, since it neither was or could have been decided in the previous suit filed before the Act took effect."

At the time the former suit was tried in 1954 the question here presented — denial of a right by the Di-

rector of Immigration and Naturalization — was not involved “*since it neither was or could have been decided in the previous suit filed before the Act took effect*”, because it was not until the 12th of May, 1955, more than a year after the judgment of dismissal of the first case that the appellee Director of Immigration and Naturalization issued and served his warrants of arrest for deportation of appellants as aliens, that that question arose.

These questions were elaborately argued and thoroughly presented in our opening brief.

The affirmance of the district court’s judgment in this case on the doctrine of *res judicata* is tantamount to a denial of rights vouchsafed to appellants in their defense of the deportation proceedings under the Fifth Amendment to the Constitution of the United States and it is earnestly requested that the question be re-examined to the end that appellants may not be foreclosed from proving in any future administrative proceeding seeking their deportation their true national status.

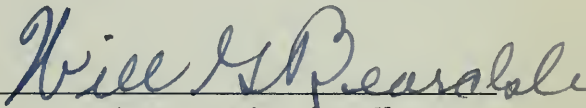
It is therefore respectfully requested that a rehearing be granted.

Respectfully submitted,

WILL G. BEARDSLEE
Attorney for Appellants

CERTIFICATE

I, Will G. Beardslee, hereby certify that in my professional judgment the petition for re-hearing herein is well founded and it is not interposed for delay.



Attorney for Appellants.



No. 15046

United States
Court of Appeals
for the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division



No. 15046

United States
Court of Appeals
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WELLS FARGO BANK & UNION TRUST CO.,
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Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern
District of California, Southern Division

No. 31436—Civil

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of WALTER K. D. GIB-
SON, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

EXCERPT FROM DOCKET ENTRIES

1952

Apr. 11—Filed complaint & issued summons.

Oct. 23—Filed answer of defendant.

1954

Dec. 29—Filed interrogatories by United States to
Plaintiff.

1955

Jan. 13—Filed answer of plaintiff to interrogatories
by United States.

June 2—Filed stipulation of facts.

June 6—Filed supplemental stipulation of facts.

June 7—Court trial. Evidence introduced, argu-
ments heard, motion of defendant to file
counterclaim submitted. Memos ordered
filed 30-30-15 days and case continued to
Aug. 22, 1955, for submission. (Judge
Harris)

- June 7—Filed jurisdictional statement and statement of facts by plaintiff.
- Sept. 23—Filed memo opinion of Court (motion of defendant to file counterclaim denied. Findings, conclusions and judgment to be prepared by counsel.) (Judge Harris)
- Nov. 23—Filed findings of fact and conclusions of law. (Judge Harris)
- Nov. 25—Entered judgment—filed Nov. 23, 1955—complaint dismissed and counterclaim of defendant denied.
- Nov. 25—Mailed notices.

1956

- Jan. 20—Filed notice of appeal by defendant.
- Jan. 23—Filed notice of appeal by plaintiff.
- Jan. 23—Filed appeal bond in sum \$250.00.
- Feb. 17—Filed appellant's designation of record on appeal (Wells Fargo).

In the United States District Court, for the Northern
District of California, Southern Division

No. 31436

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT TO RECOVER TAXES
ILLEGALLY COLLECTED

Comes now the plaintiff above named and for
cause of action against the defendant herein alleges
as follows:

I.

Walter D. K. Gibson was a citizen of the United States and a resident of the City and County of San Francisco, State of California, and died on December 21, 1938. Thereafter such proceedings were duly taken and had in and by the Superior Court of the State of California in and for the City and County of San Francisco in the matter of the Estate of Walter D. K. Gibson, Deceased, that by an order and judgment of said Court duly given and made on January 11, 1939, the will of said Walter D. K. Gibson, Deceased, was admitted to probate, and Emily A. Gibson and Wells Fargo Bank & Union Trust Co., named therein as such, were duly appointed the ex-

ecutors thereof and thereafter duly qualified as such executors, and on said date Letters Testamentary upon the will of said deceased were duly issued to them. Thereafter Wells Fargo Bank & Union Trust Co. and Emily A. Gibson were the duly appointed, qualified and acting co-executors of the will and estate of Walter D. K. Gibson, Deceased, until November 24, 1941, on which date Emily A. Gibson died and ever since said latter date Wells Fargo Bank & Union Trust Co. has been and now is the sole surviving executor of the will and estate of Walter D. K. Gibson, Deceased. Said estate was in the course of administration from January 11, 1939, to and including August 26, 1941, on which latter date said estate was finally distributed in accordance with the order of said Court duly given and made on said day and entitled "Decree Settling First and Final and Supplementary Account of Executors and of Final Distribution," but plaintiff herein was nevertheless not discharged as said executor. Said estate was composed entirely of community property in which during the continuance of the married relation decedent and his spouse had present, existing and equal interests.

II.

Clifford C. Anglim was the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of California during all times herein mentioned prior to June 1, 1942, but ever since said date has not been and is not now in office as Collector of Internal Revenue of the United States. Richard Nickell was the acting Col-

lector of Internal Revenue of the United States for the First District of California during the period beginning June 1, 1942, and ending December 31, 1942, and was likewise said acting Collector during the period beginning April 1, 1945, and ending May 13, 1945, but during the interim between said periods and subsequent to said last date has not been and is not now in office as acting Collector of Internal Revenue of the United States. James G. Smyth was the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of California at all times mentioned herein on and after May 14, 1945.

III.

On or about March 15, 1942, plaintiff, as said sole surviving executor, filed with said Clifford C. Anglim, as Collector of Internal Revenue, a Federal fiduciary income tax return for said estate for the year 1941 on Form 1041 furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return showed an income tax due from said estate for said year in the amount of Three Thousand Eight Hundred Fifteen and 44/100 Dollars (\$3,815.44), of which amount Nine Hundred Fifty-three and 86/100 Dollars (\$953.86) was paid by plaintiff, as said executor, to said Clifford C. Anglim, as Collector of Internal Revenue, on March 16, 1942. Thereafter and on June 10, 1942, the remaining portion of said tax in the sum of Two Thousand Eight Hundred Sixty-one and 58/100 Dollars (\$2,861.58) was paid by plaintiff, as said ex-

ecutor, to said Richard Nickell, as acting Collector of Internal Revenue.

IV.

In a report dated November 6, 1944, the Internal Revenue Agent in Charge at San Francisco proposed that an additional income tax in the sum of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19) be assessed against said estate for the period beginning January 1, 1941, and ending August 26, 1941. Said report proposed adjustments, the net effect of which was to increase the taxable net income reported on said income tax return from the sum of Seventeen Thousand Sixty-six and 35/100 Dollars (\$17,066.35) to the sum of Thirty-five Thousand Seven Hundred Fifty-seven and 94/100 Dollars (\$35,757.94). Said adjustments comprised an additional deduction in the sum of Nine Hundred Ninety-nine and 6/100 Dollars (\$999.06) and an addition to income in the sum of Nineteen Thousand Six Hundred Ninety and 65/100 Dollars (\$19,690.65). Said latter adjustment was based upon the determination of said Internal Revenue Agent that all the income for the period January 1, 1941, to and including August 26, 1941, attributable to the community property owned by said Walter D. K. Gibson, Deceased, and his surviving spouse, Emily A. Gibson, must be reported for income tax purposes by said estate and not one-half thereof because none of said income was distributable to said spouse during said period.

V.

Thereafter said James G. Smyth, as Collector of Internal Revenue, made demand on plaintiff, as said executor, for payment of said additional tax in the amount of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19), together with interest thereon in the sum of One Thousand Five Hundred Forty-six and 23/100 Dollars (\$1,546.23), or a total payment of Ten Thousand Seven Hundred Seven and 42/100 Dollars (\$10,707.42). On July 11, 1945, said demand was partially satisfied by payments made to said Collector in the total sum of Ten Thousand Six Hundred Ninety-two and 22/100 Dollars (\$10,692.22), leaving an unpaid portion of said demand in the amount of Fifteen and 20/100 Dollars (\$15.20). On January 17, 1947, the entire amount of said unpaid portion was paid to said Collector, together with interest thereon in the amount of One and 40/100 (\$1.40), making a total payment of Sixteen and 60/100 Dollars (\$16.60).

VI.

On or about June 30, 1947, plaintiff, as said executor, filed with the Collector of Internal Revenue of the United States for the First District of California a claim for refund of income taxes illegally collected from plaintiff for the year 1941 in the sum of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19) upon Form 843 provided for this purpose by the Commissioner of Internal Revenue of the United States. Said refund claim was based upon the following two grounds: First,

that the determination set forth in said report dated November 6, 1944, of the Internal Revenue Agent in Charge at San Francisco was erroneous in holding that during the year 1941 none of the income attributable to the community property owned by said Walter D. K. Gibson, Deceased, and his surviving spouse, Emily A. Gibson, was distributable to the said Emily A. Gibson during the period beginning January 1, 1941, and ending August 26, 1941, and therefore deductible by said estate in the determination of taxable net income. Second, that the income attributable to the widow's community interest during said period was taxable to her and not to said estate. Said refund claim stated that the correct tax liability of the estate of Walter D. K. Gibson, Deceased, for the calendar year 1941 was Three Thousand Eight Hundred Fifteen and 44/100 Dollars (\$3,815.44) and that there had been an overpayment of income taxes for said calendar year in the sum of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19), refund of which with interest was requested. A copy of said claim for refund of taxes illegally collected is attached hereto and marked "Exhibit A" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

VII.

On or about April 12, 1950, plaintiff received a certificate of overassessment issued by the Commissioner of Internal Revenue of the United States in

which he certified an overassessment of income tax of plaintiff as said executor for the year 1941 in the sum of Nine Thousand Three Hundred Sixty-two and 58/100 Dollars (\$9,362.58) but said overassessment was reduced by the sum of Two Hundred One and 39/100 Dollars (\$201.39), which amount was barred by the statute of limitations, and said overassessment was further reduced by the sum of Seven Thousand One Hundred and 35/100 Dollars (\$7,100.35) which said Commissioner alleged to be due from the estate of Emily A. Gibson, Deceased. The net overassessment allowed by said certificate was in the sum of Two Thousand Sixty and 84/100 Dollars (\$2,060.84), together with interest thereon in the sum of Three Hundred Forty-seven and 83/100 Dollars (\$347.83). A copy of said certificate of overassessment is attached hereto and marked "Exhibit B" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

VIII.

On April 13, 1950, the Commissioner of Internal Revenue of the United States, in accordance with section 3772(a)(2) of the Internal Revenue Code, duly notified plaintiff by registered mail that the claim for refund of plaintiff as said executor for the year 1941 in the amount of Nine Thousand One Hundred Sixty-one and 19/100 Dollars (\$9,161.19) was disallowed to the extent not previously allowed by said certificate of overassessment. Said Commis-

sioner thereby disallowed plaintiff's claim for refund to the extent of Seven Thousand Three Hundred One and 74/100 Dollars (\$7,301.74). A copy of said notice of partial disallowance is attached hereto and marked "Exhibit C" and is hereby referred to and by such reference is made a part of this complaint as fully and to the same extent as if it were set out at large in this paragraph.

IX.

Plaintiff alleges that the entire amount of income received by it as executor of the estate of Walter D. K. Gibson, Deceased, during the period beginning January 1, 1941, and ending August 26, 1941, and which was attributable to said Emily A. Gibson's community interest in property held by plaintiff as said executor was either: (a) not taxable income of said estate, or (b) if includible as income of said estate, was deductible as income distributable to and taxable to said Emily A. Gibson and not to plaintiff as said executor. Plaintiff further alleges that said Commissioner of Internal Revenue erroneously disallowed plaintiff's refund claim for the year 1941 to the extent of Seven Thousand One Hundred and 35/100 Dollars (\$7,100.35).

Wherefore, plaintiff prays judgment against the defendant herein for that portion of plaintiff's claim for refund disallowed by said Commissioner of Internal Revenue, to wit, the sum of at least Seven Thousand One Hundred and 35/100 Dollars (\$7,100.35), together with interest thereon as by

law provided and for his costs in this behalf sustained.

/s/ LEON de FREMERY,

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

MORRISON, HOHFELD, FOERSTER, SHU-
MAN & CLARK,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed April 11, 1952.

[Title of District Court and Cause.]

ANSWER

The defendant, by and through Chauncey Tramutolo, United States Attorney in and for the Northern District of California, for answer to the complaint filed herein alleges:

I.

Defendant admits the allegations contained in paragraph I, except that it denies the allegations contained in the last sentence of paragraph I.

II.

Defendant admits the allegations contained in paragraph II.

III.

Defendant admits the allegations contained in paragraph III.

IV.

Defendant admits the allegations contained in paragraph IV, except that it denies that any income of the estate of Walter Gibson for the period beginning January 1, 1941, through and including August 26, 1941, was attributable to community property owned by said Walter Gibson and his surviving spouse, Emily Gibson.

V.

Defendant admits the allegations contained in the first sentence of paragraph V. Defendant denies the other allegations contained in paragraph V except that it admits that plaintiff paid to said Collector an amount of \$2,160.32 on July 11, 1945, and an amount of \$15.20 on January 20, 1947.

VI.

Defendant admits that on or about June 30, 1947, plaintiff as executor of the will of Walter Gibson, deceased, filed with the Collector of Internal Revenue of the United States for the First District of California a claim for refund of income taxes for the year 1941 in the sum of \$9,161.19. Defendant denies that any income taxes were illegally collected from plaintiff for the year 1941 and further denies any allegations made in said claim for refund not herein specifically admitted.

VII.

Defendant admits the allegations contained in paragraph VII. Defendant alleges, however, that

said Certificate of Overassessment was issued in error for the reason that all of the income of the estate of Walter Gibson, deceased, for the period beginning January 1, 1941, and ending August 26, 1941, was taxable to the estate of Walter Gibson and no overassessment had, in fact, been made.

VIII.

Defendant admits the allegations contained in paragraph VIII.

IX.

Defendant denies the allegations contained in paragraph IX.

Alternative Defense

For an alternative defense to the complaint filed herein, defendant alleges:

I.

As a result of the report dated November 6, 1944, described in paragraph IV of the complaint, there was excluded by the Commissioner of Internal Revenue from the income reported by the estate of Emily A. Gibson in a fiduciary income tax return for the period beginning January 1, 1941, and ending November 24, 1941, one-half of the income of the estate of Walter Gibson which had been reported as taxable income by the estate of Emily A. Gibson. Said exclusion resulted in a determination of over-assessment in favor of the estate of Emily Gibson in the amount of \$7,359.84.

II.

The collection of the deficiency assessed against the estate of Walter Gibson, deceased, as described in paragraphs IV and V of the complaint was limited to the amount by which said deficiency exceeded the overassessment in favor of the estate of Emily Gibson.

III.

If the allegations contained in paragraphs I and IX are correct the tax owing to the defendant on the income distributable to Emily Gibson from the estate of Walter Gibson for the period beginning January 1, 1941, and ending November 24, 1941, was \$7,100.35.

IV.

If one-half the income of the estate of Walter Gibson was distributable to and taxable to Emily Gibson, the taxes on said income, owed by the estate of Emily Gibson, are equal to the amount claimed in this action. The assessment and/or collection of said taxes against the estate of Emily Gibson are now barred by the statute of limitations. Any recovery by plaintiff in this action will inure to the sole benefit of the distributees of the estate of Emily Gibson and said income will not be taxed.

V.

Defendant's right to retain said amount of \$7,100.35 is superior to any right asserted by the defendant.

Wherefore, having fully answered, defendant

prays that the complaint be dismissed at plaintiff's costs.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

[Endorsed]: Filed October 23, 1952.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true upon the trial of the above-entitled case, provided, however, that this stipulation shall be without prejudice to the right of any of the parties to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The exhibits attached to the complaint in this proceeding and the exhibits attached to this stipulation are full, true and correct copies of the respective documents or portions thereof from which they were copied and all of said exhibits are hereby referred to and by such reference are made a part of this stipulation as fully and to the same extent as if they were set out at large herein.

2. Plaintiff is the executor of the will of Walter D. K. Gibson, deceased, who died on December 21, 1938. Walter D. K. Gibson is hereinafter referred to as the "decedent." The estate of Walter D. K.

Gibson, deceased (hereinafter referred to as "Walter's Estate"), was in the course of administration from January 11, 1939, to August 26, 1941, on which latter date it was distributed in accordance with a decree of final distribution, but plaintiff herein was nevertheless not discharged as said executor. The pertinent portions of decedent's will executed on August 31, 1937, are attached hereto and marked Exhibit 1. A copy of the election agreement to take under decedent's will executed on August 31, 1937, by decedent's wife, Emily A. Gibson (hereinafter referred to as "decedent's wife"), is attached hereto and marked Exhibit 2. A copy of the pertinent portions of the decree of final distribution of Walter's Estate is attached hereto and marked Exhibit 3.

3. Under the power given to decedent's wife by decedent's will, decedent's wife withdrew on May 8, 1941, fifty per cent of Walter's Estate (other than property distributed in the form of small bequests which may be disregarded in this proceeding), and assigned those properties to the Crocker First National Bank of San Francisco to hold as trustee under a trust agreement. The property so assigned was distributed to said Crocker First National Bank as trustee under the decree of final distribution of Walter's Estate. The pertinent portions of the trust agreement are attached hereto and marked Exhibit 4.

4. At the date of death all of the property owned by decedent and all of the property owned by de-

cedent's wife was community property in which during the continuance of the marriage relation decedent and decedent's wife had present, existing and equal interests. Walter's Estate was composed entirely of the property referred to in the foregoing portion of this paragraph 4 and said estate was distributed in accordance with the provisions of decedent's will.

5. Included in the gross income reported on the 1941 fiduciary income tax return filed on behalf of Walter's Estate was \$19,690.65, representing one-half of the income attributable to the property subject to administration in Walter's Estate for the period January 1, 1941, to August 26, 1941. The return showed an income tax of \$3,815.44 due from said estate, which tax was paid in full on or before June 10, 1942.

6. The other half of the income for said period attributable to said property subject to administration in Walter's Estate, namely, \$19,690.65, was reported on the last income tax return filed for decedent's wife, which return was for the period beginning January 1, 1941, and ending November 24, 1941, on which latter date decedent's wife died. Said return was filed on or before March 15, 1942. The taxpayer for said period is hereinafter referred to as "Emily A. Gibson, deceased."

7. In a report dated November 6, 1944, the Internal Revenue Agent in Charge at San Francisco proposed that an additional income tax for 1941 in the sum of \$9,161.19 be assessed against Walter's

Estate. The net effect of the adjustments proposed in said agent's report was to increase the taxable net income reported on the return from \$17,066.35 to \$35,757.94. The adjustments comprised an additional deduction of \$999.06 and an addition to income of \$19,690.65. The latter adjustment was based upon the determination of the Revenue Agent that all the income for the period January 1, 1941, to August 26, 1941, attributable to said property subject to administration in Walter's Estate should have been reported for income tax purposes by said estate, and not one-half thereof, for the reason that none of said income was distributable to decedent's wife during such period.

8. Concurrently with the Revenue Agent's determination issued on or about November 6, 1944, that all the income for the period January 1, 1941, to August 26, 1941, attributable to the property subject to administration in Walter's Estate should have been reported for income tax purposes as income of Walter's Estate, said Revenue Agent issued a correlative thirty-day letter advising Emily A. Gibson, deceased, care of Wells Fargo Bank & Union Trust Co., that there had been an overassessment of income taxes due from Emily A. Gibson, deceased, for the period January 1, 1941, to November 24, 1941. One of the adjustments proposed in said letter was a reduction of income in the sum of \$19,690.65, which amount was one-half of the income attributable to said property subject to administration in Walter's Estate which, as noted

hereinabove, had been included as gross income in the last income tax return of Emily A. Gibson, deceased.

9. On January 22, 1945, the Commissioner of Internal Revenue (hereinafter referred to as the "Commissioner") wrote the executors of the Estate of Emily A. Gibson, deceased (hereinafter referred to as "Emily's Estate"), relative to the overassessment due Emily A. Gibson, deceased, referred to in paragraph 8 hereinabove. A copy of said letter is attached hereto and marked Exhibit 5. Attached hereto and marked Exhibit 6 is a copy of a letter dated June 6, 1945, from the attorneys for said executors and addressed to plaintiff.

10. The executors of Emily's Estate (Walter D. K. Gibson, Jr., and Grace Collins) were subsequently advised that a certificate of overassessment in the sum of \$7,359.84 had been prepared for taxpayer Emily A. Gibson, deceased, for the period January 1, 1941, to November 24, 1941. In said thirty-day letter issued on November 6, 1944, and referred to in paragraph 8 hereinabove, said executors had been advised to file a claim for refund of the proposed overassessment in the amount of \$7,359.84 and on March 7, 1945, said executors filed such a claim. On June 6, 1945, said executors authorized the Commissioner to credit said overassessment due Emily A. Gibson, deceased, against the deficiency of \$9,161.19 due from Walter's Estate. Said authorization was delivered to the executor of Walter's Estate along with said letter of June 6,

1945, addressed to plaintiff and attached hereto as Exhibit 6.

11. The subsequent demand for payment of the additional tax due from Walter's Estate in the amount of \$9,161.19 together with interest thereon of \$1,547.63, in the total sum of \$10,708.82, was satisfied in full as follows:

Deficiency plus interest		\$10,708.82
(a) July 11, 1945, by cash	\$ 2,160.32	
(b) July 11, 1945, credit of over-assessment due Emily A. Gibson, deceased	7,359.84	
(c) July 11, 1945, credit of interest on overassessment due Emily A. Gibson, deceased	1,172.06	10,692.22
		<hr/>
Balance owing	\$	15.20
Interest on balance		1.40
		<hr/>
		\$ 16.60
(d) January 17, 1947, by cash	\$	16.60
		<hr/> <hr/>

12. The tax deficiency, plus interest, assessed against Walter's Estate in the total sum of \$10,708.82, was chargeable to the beneficiaries or transferees of beneficiaries under the will of decedent as follows:

50% thereof to Crocker First National Bank of San Francisco, as transferee of decedent's wife who established a trust with said bank as trustee as referred to in paragraph 3 hereinabove.

12½% to Walter D. K. Gibson, Jr.

121½% to the Joanne Gibson trust.

25% to the Grace G. Collins trust.

Walter's Estate reimbursed the executors of Emily's Estate on July 11, 1945, for the use of the overassessment of \$7,359.84 of income taxes due from Emily A. Gibson, deceased, for the period January 1 to November 24, 1941, together with interest thereon in the sum of \$1,172.06. The amount of such reimbursement to the executors of decedent's wife was distributable under the terms of her will as follows:

50% to Walter D. K. Gibson, Jr., and

50% to Grace G. Collins.

There was finally distributed to Walter D. K. Gibson, Jr., and Grace G. Collins as residuary legatees under the will of decedent's wife the sum of \$9,717.50 to each.

13. On or about June 30, 1947, plaintiff as said executor filed a claim for refund of said additional tax. A copy of said refund claim is attached to the complaint filed herein and marked Exhibit A thereof.

14. In a letter dated April 8, 1948, the Internal Revenue Agent in Charge at San Francisco advised Walter's Estate that an examination had been made by a representative of that office concerning the income tax liability of said estate for the taxable year ended December 31, 1941, in connection with said estate's claim for refund in the amount of

\$9,161.19. A copy of said letter, together with the report attached thereto, is attached hereto and marked Exhibit 7.

15. On or about April 12, 1950, plaintiff received a certificate of overassessment which certified that the income tax of Walter's Estate for the year 1941 had been overassessed in the sum of \$9,362.58, but that such overassessment was reduced by the sum of \$201.39, which amount was barred by the statute of limitations, leaving a balance of \$9,161.19, the amount claimed in the aforesaid refund claim. However, such overassessment was further reduced by the sum of \$7,100.35, which sum was the amount of a proposed deficiency in tax due from Emily A. Gibson, deceased. The net overassessment allowed by said certificate was \$2,060.84, together with interest thereon of \$347.83, or a total sum of \$2,408.67. On or about April 12, 1950, the executor of Walter's Estate received a check in full payment of said net overassessment. A copy of said certificate of overassessment is attached to the complaint filed herein and marked Exhibit B thereof.

16. On April 13, 1950, the Commissioner notified plaintiff by registered mail that the claim for refund was disallowed to the extent not previously allowed by the certificate of overassessment. The Commissioner thereby disallowed the claim for refund to the extent of \$7,301.74 (overassessment of \$9,362.58 less \$2,060.84 allowed). A copy of the notice of partial disallowance is attached to the

complaint filed herein and marked Exhibit C thereof.

17. In a thirty-day letter dated January 25, 1949, taxpayer Emily A. Gibson, deceased, care of Wells Fargo Bank & Union Trust Co., was advised that a deficiency in income taxes for the period ended November 24, 1941, had been proposed in the amount of \$7,100.35. Said thirty-day letter stated, "For explanation of adjustments made herein reference is made to the report of the Estate of Walter D. K. Gibson, deceased." The report thus referred to is Exhibit 7 attached hereto. Said proposed deficiency was due to the determination by the Revenue Agent that the one-half share of Emily A. Gibson in the income received by the executor of Walter's Estate during said period was taxable to Emily A. Gibson, deceased. The difference between the amounts of said proposed deficiency (\$7,100.35) and the afore-said overassessment (\$7,359.84) is due chiefly to adjustments correcting an understatement of capital loss and an overstatement of trust income.

18. Taxpayer Emily A. Gibson, deceased, protested said proposed deficiency on the ground that the statute of limitations had expired and that section 3801 of the Internal Revenue Code of 1939 providing an extended statute in regard to related taxpayers did not apply. Thereafter the Internal Revenue Agent in Charge at San Francisco made the following conclusions:

"That the report of the examining officer be modified to reflect no deficiency at this time

pending the obtaining of a final determination of the income tax liability of the Estate of Walter D. K. Gibson, Deceased, for the year 1941.”

19. No statutory notice of deficiency has ever been issued by the Commissioner against Emily A. Gibson, deceased, or Emily’s Estate for the amount of \$7,100.35 to which defendant alleges its rights are superior to those of plaintiff.

20. Emily’s Estate was distributed in accordance with a decree of final distribution entered on January 23, 1947. According to the inventory and final accounting rendered in the probate of Emily’s Estate, there were total assets and receipts of \$75,076.26 and total disbursements other than payment of legacies of \$39,141.14. As the residuary legatees of Emily’s Estate, Walter D. K. Gibson, Jr., received cash and assets valued at \$9,717.50 and Grace Collins received cash and assets valued at \$9,717.50.

21. If the judgment prayed for herein is granted, the refund thereby payable to plaintiff will be distributed in accordance with paragraphs 9 and 12 of the decree of final distribution of Walter’s Estate dated August 26, 1941, Exhibit 3 attached hereto.

22. In summary form, a distribution according to the terms of said paragraph 9 would be apportioned as follows:

(a) One-fourth outright to Walter D. K. Gibson, Jr.

(b) One-fourth in trust to Joanne Gibson, the granddaughter of decedent, net income payable to her annually. The trust to terminate and the corpus to be paid over to her when she reaches thirty years of age (February 23, 1959.) If Joanne Gibson fails to attain such age, and Walter D. K. Gibson, Jr., survives her, corpus over to him free of trust on her death. If Joanne Gibson should not reach thirty years of age, and Walter D. K. Gibson, Jr., predeceases her, corpus over to Grace Collins on the death of Joanne Gibson. In such event, the trust described in subdivision (c) below shall also terminate on Joanne Gibson's death, and the corpus shall be paid over to Grace Collins free of trust.

(c) One-half in trust to Grace Collins, net income payable to her during her lifetime. Upon her death, one-half of the corpus of said trust over to Walter D. K. Gibson, Jr., free of trust, and the remaining one-half of said corpus shall become, if Joanne Gibson be then living, part of the trust described in subdivision (b) above, or shall go to Joanne Gibson free of trust, as the case may be, according to the terms of subdivision (b) above. If Grace Collins becomes a widow at any time, the trust described in this subdivision (c) to terminate and the corpus to be paid over to her free of trust. Grace Collins has the power to invade the corpus to the extent of \$5,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

23. It is agreed by and between the parties hereto that plaintiff's answers to interrogatories propounded by defendant filed January 13, 1955, may be utilized by the plaintiff as well as the defendant as evidence in this proceeding.

24. It is agreed by and between the parties hereto that the amount of tax in dispute exclusive of interest is \$7,100.35.

Dated: May 23, 1955.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOLLOWAY, SHU-
MAN & CLARK,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
Defendant.

EXHIBIT No. 5

Treasury Department
Washington 25

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to IT:C1:CC:3-EK

Grace G. Collins, Executrix, and
Walter D. K. Gibson, Jr., Executor,
Estate of Emily A. Gibson,
c/o Wells Fargo Bank and Union Trust Co.,
4 Montgomery Street,
San Francisco, California.

Sir and Madam:

Attention is invited to a tentative finding of the Bureau that income for the year 1941, originally taxed on your return, is apparently taxable to Estate of Walter D. K. Gibson, resulting in a proposed overassessment in your favor and a proposed deficiency against the Estate.

If you will authorize the credit of your apparent overpayment to the proposed deficiency in question, further consideration will be given, with a view to finally determining the tax liability of both parties, and your consent to credit would relieve the apparent deficiency taxpayer of the payment of the additional tax to the extent of the amount of the proposed overassessment in your favor. Pending

the receipt of such an agreement to credit, however, no overassessment is available for either credit or refund purposes.

If this adjustment is effected, and a refund found to be due you after the application of the credit, a Treasury check will be issued in settlement thereof, together with allowable interest.

In the event this adjustment is satisfactory to you, it is requested that you sign the enclosed consent to credit and return it to this office, for the attention of IT:C1:CC:3-EK.

By direction of the Deputy Commissioner:

Respectfully,

/s/ T. C. ATKESON,

Head of Division.

Enclosure:

Consent to Credit.

493M

Consent to Credit

IT:C1:CC:3-EK

We, Grace C. Collins, Executrix, and Walter D. K. Gibson, Jr., Executor, Estate of Emily A. Gibson, c/o Wells Fargo Bank and Union Trust Company, 4 Montgomery Street, San Francisco, California, do hereby authorize the Commissioner of Internal Revenue to credit an overpayment of the Estate's income taxes in the amount of \$7,359.84 for

the year 1941 to additional taxes in the amount of \$9,161.19 for the year 1941.

We, the Executrix and Executor of the above-named Estate, also hereby certify that we are still legally acting in such capacity.

.....,
Executrix.

.....,
Executor.

EXHIBIT No. 6

June 6, 1945.

Wells Fargo Bank & Union Trust Co.,
Market at Montgomery Street,
San Francisco, California.

Attention: Mr. H. G. King.

Re: Estate of Walter D. K. Gibson, Dec'd.

Gentlemen:

We are handing you, herewith, the authorization by the Executors of the will of Emily A. Gibson, deceased, to the application of the refund owing to that estate on account of 1941 income taxes to the deficiency income tax owing for that year by the estate of Walter D. K. Gibson, deceased. The use of this document is conditioned upon the transfer out of the estate of Walter D. K. Gibson, deceased, to the estate of Emily A. Gibson, of securities equal

in value to the actual amount of the credit applied to the discharge of the deficiency tax owing by the Walter D. K. Gibson estate, including any interest so applied, such securities to be evaluated as at the date of the application of said credit.

It is our understanding that the balance of the deficiency tax owing by the estate of Walter D. K. Gibson, deceased, will be paid out of the proceeds of the sale of securities held in the tax reserve for that purpose or in part by such proceeds and in part by cash contributions to be made by the persons interested in said tax reserve, in the proportions in which they are interested therein.

In this connection we refer to our recent letter stating that Mr. Walter D. K. Gibson, Jr., finds it inconvenient at this time to make any cash contribution toward this tax and that so far as he is concerned the sale of fractional and odd lot shares of stock will be proper.

Yours very truly,

MORRISON, HOHFELD, FOERSTER, SHU-
MAN & CLARK,

By

WTF:em

Enclosure

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the Stipulation of Facts heretofore filed in the above-entitled case shall be amended in the following respects:

1. Paragraph 21 of said Stipulation of Facts is hereby stricken and in its place the following paragraph is inserted:

21. If the judgment prayed for herein is granted, the refund thereby payable to plaintiff will be distributed in accordance with the decree of final distribution of Walter's Estate dated August 26, 1941, set forth in part in Exhibit 3 attached hereto.

2. Paragraph 22 of said Stipulation of Facts is hereby stricken and in its place the following paragraph is inserted:

22. In summary form, a distribution according to the terms of said decree of final distribution would be apportioned as follows:

(a) One-half in trust to Crocker First National Bank of San Francisco as trustee under the trust created by decedent's wife described in paragraph 3 hereinabove and set forth in part in Exhibit 4 attached hereto. Under the terms of this trust, the corpus is divided into two parts: Trust Estate No. One and Trust Estate No. Two.

(1) Under Trust Estate No. One the net income is payable to Grace Morris (now Grace Collins) during her lifetime. Grace Morris (Collins) has the power to appoint the trust property at her death to her surviving spouse or his descendants, or to her descendants, or to the descendants of decedent's wife (Emily A. Gibson), or to the spouses of the aforementioned descendants. If she does not exercise her power, the trust property at her death goes to her issue, or if no issue survive her, then the property shall become a part of Trust Estate No. Two. If, in the opinion of the trustees, the income from the trust shall become insufficient for the proper support, maintenance and care of Grace Morris (Collins), the trustee may pay to her from corpus such amounts, in its sole discretion, as are necessary for her care, maintenance and support, provided that such amounts shall not exceed \$5,000 per year. Since reaching the age of fifty-five (June 16, 1949), Grace Morris (Collins) has the power to invade the corpus to the extent of \$10,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

(2) Under Trust Estate No. Two the net income is payable to Walter D. K. Gibson, Jr., during his lifetime. Walter D. K. Gibson, Jr., has the power to appoint the trust property at his death to his surviving spouse or her de-

scendants, or to his descendants, or to the descendants of decedent's wife (Emily A. Gibson), or to the spouses of the aforementioned descendants. If he does not exercise his power, the trust property at his death goes to his issue, or if no issue survive him, then the property shall become a part of Trust Estate No. One. If, in the opinion of the trustee, the income from the trust shall become insufficient for the proper support, maintenance and care of Walter D. K. Gibson, Jr., the trustee may pay to him from corpus such amounts, in its sole discretion, as are necessary for his care, maintenance and support, provided that such amounts shall not exceed \$5,000 per year. After reaching the age of fifty-five (June 16, 1958), Walter D. K. Gibson, Jr., has the power to invade the corpus to the extent of \$10,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

(b) One-eighth outright to Walter D. K. Gibson, Jr.

(c) On-eighth in trust to Joanne Gibson, the granddaughter of decedent, net income payable to her annually. The trust to terminate and the corpus to be paid over to her when she reaches thirty years of age (February 23, 1959). If Joanne Gibson fails to attain such age, and Walter D. K. Gibson, Jr., survives her, corpus

over to him free of trust on her death. If Joanne Gibson should not reach thirty years of age, and Walter D. K. Gibson, Jr., predeceases her, corpus over to Grace Collins on the death of Joanne Gibson. In such event, the trust described in subdivision (d) below shall also terminate on Joanne Gibson's death, and the corpus shall be paid over to Grace Collins free of trust.

(d) One-fourth in trust to Grace Collins, net income payable to her during her lifetime. Upon her death, one-half of the corpus of said trust over to Walter D. K. Gibson, Jr., free of trust, and the remaining one-half of said corpus shall become, if Joanne Gibson be then living, part of the trust described in subdivision (c) above, or shall go to Joanne Gibson free of trust, as the case may be, according to the terms of subdivision (c) above. If Grace Collins becomes a widow at any time, the trust described in this subdivision (d) to terminate and the corpus to be paid over to her free of trust. Grace Collins has the power to invade the corpus to the extent of \$5,000 per year, which power is cumulative so that any sum subject to said power not withdrawn in any year may be withdrawn in any succeeding year.

Dated: June 7, 1955.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOLLOWAY, SHU-
MAN & CLARK,

Attorneys for Plaintiff.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ GEORGE A. BLACKSTONE,

Assistant United States Attorney, Attorneys for
Defendant.

[Endorsed]: Filed June 6, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

The action is one brought under Section 1346(a) (1) Title 28 U.S.C. for the refund of federal income taxes alleged to be erroneously assessed and collected.

The essential facts are not in dispute and have been the subject of stipulation: The taxpayer is the executor of the Last Will and Testament of Walter Gibson, who died on December 21, 1938. His estate was in the course of administration until August 26, 1941. Under the terms of his Last Will his property was placed in trust. His wife was named as the income beneficiary. The terms of the trust are not immediately important.

His Last Will, among other things, stated that its provisions were conditioned on his wife's waiving

her right to take one-half of their community property. Such a waiver was executed by his wife contemporaneously with the execution of the will.

The Will also gave her the power to withdraw one-half of the amount of the corpus of the trust for any purpose she might desire. This power was exercised by the wife when she assigned to the Crocker First National Bank as trustee one-half of the corpus of the trust established by the decedent. This property was distributed to the Crocker Bank under the Decree of Final Distribution of decedent's estate.

For the period January 1, 1941, through August 26, 1941, one-half of the income attributable to the property subject to administration in the husband's estate was returned by the taxpayer for purposes of federal income tax; the other half was reported on a return filed by the estate of the wife, Emily, she having died on November 24, 1941. A deficiency was proposed against the estate of Walter, the husband, on the ground that the entire income for that period was taxable to him. Concurrently, an overassessment was proposed with respect to the tax paid by the estate of the wife, Emily. By agreement between the parties the deficiency assessed against the husband's estate was satisfied by setting off against it the overassessment in favor of the estate of the wife and the balance was paid in cash. The wife's estate was reimbursed for the use of this certificate of overassessment. That amount was charged by the husband's estate to his heirs.

Plaintiff taxpayer, executor of the Last Will of Walter Gibson, filed a claim for refund of income taxes on the ground that for the period in question only one-half of the income was chargeable to his estate, the other half being chargeable to the estate of Emily Gibson. The government allowed this claim in the amount of \$9,362.58. Such refundable sum was reduced by the amount which thereby became due from the estate of Emily Gibson. The government paid the balance to the taxpayer. In this suit plaintiff seeks to recover that part of the amount of its claim for refund which was not refunded in cash, i.e., \$7,100.35.

The foregoing statement of facts is sufficient to focus attention upon the basic legal question involved which centers around the case of *Bishop v. Commissioner*, 152 F. 2d 389 (9th Cir.). In the *Bishop* case the taxpayer and his wife, California residents throughout their married life, had present, existing and equal rights in the community property. During the administration of the estate of the husband half of the income was reported by the estate and half by the widow. The Commissioner sought to tax all the income as that of the estate. The Court of Appeals held that the widow, being the owner of a one-half interest in the community property, owned one-half of the income therefrom. Therefore the estate, it was held, could not be taxed on more than one-half.

The primary distinction between *Bishop* and the case at bar is apparent. The decedent, Walter Gib-

son, made and executed a Will in which he purported to dispose of the entire community property. The Will recited that it was conditioned on the assumption that his wife, Emily Gibson, would waive her community property rights in the estate and accept the provisions of the Will. The wife, according to the stipulated facts, agreed to take according to the Will and waived community property rights.

The election engaged in by the wife, Emily, is binding and enforceable under California law. *Flanagan v. Capital National Bank*, 213 C. 664; *Security First National Bank v. Stack*, 32 C. A. 2d 586. There is no contention urged that the husband took advantage of his wife or that there was any overreaching or element of estoppel. Upon the husband's death, in view of this election, the entire community property became the estate of the husband. The test or criterion of ownership referred to in the Bishop case is not present. The widow's relationship to the estate was that of a beneficiary.

In *Flanagan v. Capital National Bank*, *supra*, in discussing a so-called "waiver," the court said:

"The 'waiver' was in fact a contract by the terms of which plaintiff accepted certain devises and bequests under the will in lieu of any rights she might have in any community property. Such an agreement is clearly supported by consideration and is binding upon the plaintiff * * *"

Pacific National Bank 40 B.T.A. 128, and *Coffman Dobson Bank*, 20 B.T.A. 890, relied on by

plaintiff, are beside the point and involve principles of estate tax rather than income tax. These cases hold that community property, though administered by the estate of the first spouse to die, is subject to an estate tax only on the one-half properly attributable to the decedent. They do not rule that a unit created by the Will of the decedent under a valid election of one of the spouses, may be considered thereafter as a community interest and divisible for income tax purposes during the period of probate administration.

The contention is also advanced by plaintiff that because the Will gave the wife the right to withdraw up to 50% of the trust, consequently she had the right to revoke her agreement at any time and withdraw her consideration. It is sufficient answer to this contention to say that under no circumstances could the wife obtain any ownership or control until a distribution was effected on the estate of her husband.

The waiver executed by Emily was binding upon the parties and under the circumstances of the case there is no reason why this Court should not give recognition to the laws of the State of California, permitting a husband and wife by their contract to change the character of the property acquired by them.

In *O'Bryan v. Commissioner*, 148 F. 2d 456, our Court of Appeals said:

“However, California law, Civil Code Calif., §§ 158, 159, permits a husband and wife by their

contract to change the character of property thereafter acquired from community to separate, and such an agreement has been held effective to alter the nature of the property for income tax purposes." (p. 458.)

Likewise, in the case at bar, the Court finds that Emily Gibson's waiver changed the character of the community interest upon the death of her husband and that the executor of the Last Will of Walter Gibson was liable for the full amount of taxes assessed against it. In view of the foregoing ruling it becomes unnecessary to consider the secondary defense urged by the government wherein the doctrine of equitable recoupment is urged.

The action must be dismissed as against the defendant United States of America.

During the course of the oral arguments before this Court the government proposed a counterclaim. Section 6532(b) of the Internal Revenue Code of 1954 (26 U.S.C.A. 6532[b]) bars the filing of a claim for collection of a refund unless the claim is instituted within two years after the refund is made. In the instant case the two-year statute of limitations expired just one day after the plaintiff commenced this action on April 11, 1952.

The government presented its leave to file a counterclaim only at the conclusion of the trial of the case in June of 1955, some five years after making the erroneous refund. Rule 13(f) permits a pleader to set up a counterclaim when he fails to

do so through oversight, inadvertence or excusable neglect or when justice so requires. The government was aware of its refund for the full statutory period and yet failed to act by demanding its return until the trial itself. Under these circumstances, the government's excuse for the delay is not encompassed in the several grounds set forth in Rule 13 F.R.C.P. Defendant's delay constitutes laches.

It is also to be noted that this case was tried upon a stipulation of facts. Under the stipulation, agreed upon by the defendant, the amount of tax in dispute exclusive of interest, was fixed at \$7,100.35. (Stipulation 24.) It would be unfair for the defendant, particularly during the closing stages of the litigation, to seek an additional \$2,000 after agreeing that the amount in dispute is \$7,100.35.

Under the circumstances, the defendant's motion for leave to file the counterclaim is denied.

Findings may be prepared in accordance with the foregoing and Judgment entered thereon.

Dated: September 23, 1955.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed September 23, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on June 7, 1955, before the Court sitting without a jury, Honorable George B. Harris, United States District Judge, presiding. Clarence E. Musto, Esq. and Franklin C. Latcham, Esq., appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the matter having been briefed, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. The above-entitled action was brought by plaintiff to recover federal income taxes in the sum of \$7,100.35 with interest thereon from date of payment.

2. The allegations of paragraphs 2, 3, 7 and 8 of the complaint are true. The allegations of paragraph 1 of the complaint are true, except that portion of last sentence thereof which alleges that said estate was composed entirely of community property. The allegations of paragraph 4 of the complaint are true, except that portion of the last sentence thereof which alleges that income for the period January 1, 1941, to August 26, 1941, was attributable to com-

munity property. The allegations of paragraph 5 of the complaint are true, except that \$8,531.90 of said additional tax was satisfied on July 11, 1945, by crediting an overassessment due Emily A. Gibson, deceased, in the amount of \$7,359.84 plus interest of \$1,172.06.

3. The Last Will and Testament of Walter D. K. Gibson, executed on August 31, 1937, left all of his property in trust, and provided that it was conditioned on his wife, Emily A. Gibson, waiving her right to take one-half of the community property. Emily A. Gibson executed an election agreement to take under the will on August 31, 1937.

4. On May 8, 1941, pursuant to a power given her under the will, Emily A. Gibson withdrew fifty per cent of the corpus of the Estate of Walter D. K. Gibson, deceased, and assigned such property to the Crocker First National Bank of San Francisco to hold as trustee under a trust agreement. The property so assigned was distributed to said trustee under the decree of final distribution of said estate on August 26, 1941.

5. At the date of the death of Walter D. K. Gibson on December 21, 1938, all the property owned by him, and all the property owned by his wife, was community property in which during the continuance of the marriage relationship they had present, existing and equal interests. The estate of said decedent was composed entirely of the property referred to in this paragraph, and said estate was

distributed in accordance with the provisions of decedent's will.

6. On June 30, 1947, plaintiff filed a claim for refund of taxes in the sum of \$9,161.19 for said estate for the year 1941. On April 12, 1950, said claim was allowed by the Commissioner of Internal Revenue, who reduced the amount payable by \$7,-100.35, the sum of a proposed deficiency in the tax due from Emily A. Gibson, deceased. The balance of \$2,060.84, plus interest of \$347.83 was paid to plaintiff on April 12, 1950.

7. On April 13, 1950, the Commissioner notified plaintiff that the claim for refund was disallowed to the extent not previously allowed by the certificate of overassessment of April 12, 1950.

8. On June 7, 1955, during the course of the trial herein, the defendant made an oral motion for permission to file a counterclaim for \$2,408.67, the amount of principal and interest paid to plaintiff on April 12, 1950. On July 29, 1955, as part of its brief, defendant renewed this motion and attached a proposed amendment to its answer setting forth such counterclaim.

Conclusions of Law

1. The election by Emily A. Gibson to waive her community property right and take according to the will changed the character of the community interest upon the death of her husband and the entire community property became the estate of the husband.

2. The Commissioner properly determined in accordance with law that the executor was liable for income taxes based upon the entire net income of the Estate of Walter D. K. Gibson, deceased.

3. The Government's counterclaim is barred by the two year statute of limitations prescribed in Section 6532(b) of the Internal Revenue Code of 1954 (26 U.S.C.A. 6532(b)), and by laches.

4. Defendant is entitled to judgment herein that plaintiff recover nothing and dismissing the complaint.

Dated: Nov. 23, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Affidavit of Mail attached.

Lodged October 24, 1955.

[Endorsed]: Filed November 23, 1955.

In the United States District Court, for the Northern District of California, Southern Division

Civil No. 31436

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on June 7, 1955, before the Court sitting without a jury, Honorable George B. Harris, United States District Judge, presiding. Clarence E. Musto, Esq. and Franklin C. Latcham, Esq., appeared for plaintiff, and Lloyd H. Burke, Esq., United States Attorney, by George A. Blackstone, Esq., Assistant United States Attorney, appeared for defendant. Evidence having been introduced and the cause submitted for decision upon briefs and the Court having made its findings of fact and conclusions of law,

Now Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint and cause of action therein be and the same is hereby dismissed.

/s/ GEORGE B. HARRIS,

United States District Judge.

Dated: Nov. 23, 1955.

Affidavit of Service by Mail attached.

Lodged October 24, 1955.

[Endorsed]: Filed November 23, 1955.

Entered November 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT
OF APPEALS

It Is Further Ordered, Adjudged and Decreed that the motion of the defendant to file a counter-claim herein be and the same is hereby denied.

Notice Is Hereby Given that Wells Fargo Bank & Union Trust Co., Executor of the Will of Walter D. K. Gibson, Deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment dismissing plaintiff's complaint entered in this action on November 25, 1955.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOL-
LOWAY, SHUMAN & CLARK,

Attorneys for Plaintiff-Appellant Wells Fargo
Bank & Union Trust Co., Executor of the Will
of Walter D. K. Gibson, Deceased.

[Endorsed]: Filed January 23, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by counsel for the parties thereto:

Excerpt From Docket Entries.

Complaint With Exhibits Attached.

Answer of Defendant.

Interrogatories by Defendant to Plaintiff.

Answer of Plaintiff to Interrogatories by Defendant.

Stipulation of Facts With Attached Exhibits.

Supplemental Stipulation of Facts.

Jurisdictional Statement and Statement of Facts.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal by Defendant.

Notice of Appeal by Plaintiff.

Appeal Bond.

Appellant's Designation of Record on Appeal
(Wells Fargo).

Reporter's Transcript of Proceedings of
June 7, 1955.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
23rd day of February, 1956.

[Seal]

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 15046. United States Court of
Appeals for the Ninth Circuit, Wells Fargo Bank
& Union Trust Co., Executor of the Will of Walter
D. K. Gibson, Deceased, Appellant, vs. United
States of America, Appellee. Transcript of Record.
Appeal From the United States District Court for
the Northern District of California, Southern Di-
vision.

Filed: February 23, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15046

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K. Gibson,
Deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

The points upon which appellant will rely on this appeal are:

The District Court erred:

1. In holding that the election by Emily A. Gibson to waive her community property right and take according to the will changed the character of the community interest upon the death of her husband and the entire community property became the estate of the husband.

2. In holding that the Commissioner of Internal Revenue properly determined in accordance with law that the Executor of the Estate of Walter D. K. Gibson, deceased, was liable for income taxes based upon the entire net income of the Estate for the period from January 1, 1941, to August 26, 1941.

3. In failing to hold upon the facts and the law that one-half of the net income received by the Estate of Walter D. K. Gibson, deceased, for the period from January 1, 1941, to August 26, 1941, was taxable to the Executor of said Estate, and that one-half of the net income was taxable to Emily A. Gibson.

4. In entering judgment that the plaintiff's complaint and cause of action therein be dismissed.

Dated: March 6, 1956.

/s/ W. T. FITZGERALD,

/s/ CLARENCE E. MUSTO,

/s/ FRANKLIN C. LATCHAM,

MORRISON, FOERSTER HOL-
LOWAY, SHUMAN & CLARK,
Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed March 6, 1956.

Date	Description	Amount	Balance	Page
1890				
Jan 1	Balance forward	100.00	100.00	1
Jan 5	Received from A. B.	25.00	125.00	2
Jan 10	Received from C. D.	15.00	140.00	3
Jan 15	Received from E. F.	10.00	150.00	4
Jan 20	Received from G. H.	5.00	155.00	5
Jan 25	Received from I. J.	5.00	160.00	6
Jan 30	Received from K. L.	5.00	165.00	7
Feb 1	Received from M. N.	5.00	170.00	8
Feb 5	Received from O. P.	5.00	175.00	9
Feb 10	Received from Q. R.	5.00	180.00	10
Feb 15	Received from S. T.	5.00	185.00	11
Feb 20	Received from U. V.	5.00	190.00	12
Feb 25	Received from W. X.	5.00	195.00	13
Feb 30	Received from Y. Z.	5.00	200.00	14
Mar 1	Received from A. B.	5.00	205.00	15
Mar 5	Received from C. D.	5.00	210.00	16
Mar 10	Received from E. F.	5.00	215.00	17
Mar 15	Received from G. H.	5.00	220.00	18
Mar 20	Received from I. J.	5.00	225.00	19
Mar 25	Received from K. L.	5.00	230.00	20
Mar 30	Received from M. N.	5.00	235.00	21
Apr 1	Received from O. P.	5.00	240.00	22
Apr 5	Received from Q. R.	5.00	245.00	23
Apr 10	Received from S. T.	5.00	250.00	24
Apr 15	Received from U. V.	5.00	255.00	25
Apr 20	Received from W. X.	5.00	260.00	26
Apr 25	Received from Y. Z.	5.00	265.00	27
Apr 30	Received from A. B.	5.00	270.00	28
May 1	Received from C. D.	5.00	275.00	29
May 5	Received from E. F.	5.00	280.00	30
May 10	Received from G. H.	5.00	285.00	31
May 15	Received from I. J.	5.00	290.00	32
May 20	Received from K. L.	5.00	295.00	33
May 25	Received from M. N.	5.00	300.00	34
May 30	Received from O. P.	5.00	305.00	35
Jun 1	Received from Q. R.	5.00	310.00	36
Jun 5	Received from S. T.	5.00	315.00	37
Jun 10	Received from U. V.	5.00	320.00	38
Jun 15	Received from W. X.	5.00	325.00	39
Jun 20	Received from Y. Z.	5.00	330.00	40
Jun 25	Received from A. B.	5.00	335.00	41
Jun 30	Received from C. D.	5.00	340.00	42
Jul 1	Received from E. F.	5.00	345.00	43
Jul 5	Received from G. H.	5.00	350.00	44
Jul 10	Received from I. J.	5.00	355.00	45
Jul 15	Received from K. L.	5.00	360.00	46
Jul 20	Received from M. N.	5.00	365.00	47
Jul 25	Received from O. P.	5.00	370.00	48
Jul 30	Received from Q. R.	5.00	375.00	49
Aug 1	Received from S. T.	5.00	380.00	50
Aug 5	Received from U. V.	5.00	385.00	51
Aug 10	Received from W. X.	5.00	390.00	52
Aug 15	Received from Y. Z.	5.00	395.00	53
Aug 20	Received from A. B.	5.00	400.00	54
Aug 25	Received from C. D.	5.00	405.00	55
Aug 30	Received from E. F.	5.00	410.00	56
Sep 1	Received from G. H.	5.00	415.00	57
Sep 5	Received from I. J.	5.00	420.00	58
Sep 10	Received from K. L.	5.00	425.00	59
Sep 15	Received from M. N.	5.00	430.00	60
Sep 20	Received from O. P.	5.00	435.00	61
Sep 25	Received from Q. R.	5.00	440.00	62
Sep 30	Received from S. T.	5.00	445.00	63
Oct 1	Received from U. V.	5.00	450.00	64
Oct 5	Received from W. X.	5.00	455.00	65
Oct 10	Received from Y. Z.	5.00	460.00	66
Oct 15	Received from A. B.	5.00	465.00	67
Oct 20	Received from C. D.	5.00	470.00	68
Oct 25	Received from E. F.	5.00	475.00	69
Oct 30	Received from G. H.	5.00	480.00	70
Nov 1	Received from I. J.	5.00	485.00	71
Nov 5	Received from K. L.	5.00	490.00	72
Nov 10	Received from M. N.	5.00	495.00	73
Nov 15	Received from O. P.	5.00	500.00	74
Nov 20	Received from Q. R.	5.00	505.00	75
Nov 25	Received from S. T.	5.00	510.00	76
Nov 30	Received from U. V.	5.00	515.00	77
Dec 1	Received from W. X.	5.00	520.00	78
Dec 5	Received from Y. Z.	5.00	525.00	79
Dec 10	Received from A. B.	5.00	530.00	80
Dec 15	Received from C. D.	5.00	535.00	81
Dec 20	Received from E. F.	5.00	540.00	82
Dec 25	Received from G. H.	5.00	545.00	83
Dec 30	Received from I. J.	5.00	550.00	84
Total			550.00	

No. 15,046

United States Court of Appeals
For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K.
Gibson, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

W. T. FITZGERALD,
CLARENCE E. MUSTO,
FRANKLIN C. LATCHAM,
MORRISON, FOERSTER, HOLLOWAY,
SHUMAN & CLARK,
Crocker Building, San Francisco 4, California,
Attorneys for Appellant.

FILED

JUN -1 1956

PAUL P. O'BRIEN, CLERK



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No. 15,046

United States Court of Appeals For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K.
Gibson, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

This action was brought in the District Court under section 1346(a)(1), title 28 U.S.C., for the refund of federal income taxes erroneously assessed and collected. On June 30, 1947, appellant filed a claim for refund of said taxes paid. On April 13, 1950, the Commissioner of Internal Revenue notified appellant that its claim for refund was partially disallowed in the amount of \$7,100.35. On April 11, 1952, appellant filed its complaint in this action to recover said \$7,100.35, with interest (R. 5). The judgment of the District Court was entered on November 25, 1955 (R. 48). Appellant filed its notice of appeal to

this Court on January 23, 1956 (R. 49).¹ The jurisdiction of this Court rests on sections 1291, 1294 and 2107, title 28, U.S.C.

OPINION BELOW.

The memorandum opinion of the District Court (R. 37) is reported at 134 F.Supp. 340.

QUESTIONS PRESENTED.

1. Whether the income received by the estate of a deceased husband during administration is wholly taxable to the estate, or taxable half to the estate and half to the surviving wife where the estate was comprised entirely of community property in which the husband and wife had present and equal interests at the time of the husband's death.

2. Whether in such a case the income received by the estate is wholly taxable to the estate, or half to the estate and half to the surviving wife where the wife consented to take under the husband's will, but retained the right to withdraw half of the estate.

3. Whether the defense of equitable recoupment applies to prevent a recovery by appellant in this case.

¹The United States, appellee herein, also filed a notice of appeal from the judgment of the District Court which denied appellee's motion to file a counterclaim. The appeal was dismissed on March 16, 1956, pursuant to stipulation of the parties.

STATEMENT OF FACTS.

Appellant is the executor of the will of Walter D. K. Gibson, deceased, who died on December 21, 1938 (R. 17, Stip. par. 2). Walter D. K. Gibson is hereinafter referred to as the "decedent." The estate of Walter D. K. Gibson, hereinafter referred to as "Walter's Estate," was in the course of administration from January 11, 1939, to August 26, 1941, when it was distributed under a decree of final distribution, but appellant was nevertheless not discharged as executor (R. 17, 18, Stip. par. 2).

Decedent's will was executed on August 31, 1937 (R. 18, Stip. par. 2). Decedent's wife, Emily A. Gibson (hereinafter referred to as "decedent's wife"), executed on August 31, 1937, a waiver whereby she elected to take under decedent's will (R. 18, Stip. par. 2, Ex. 2²), and she did in fact take under decedent's will (R. 18, 19, Stip. pars. 2 and 4).

All the property owned by decedent and decedent's wife at the date of his death was community property in which during the continuance of the marriage relationship decedent and decedent's wife had present, existing and equal interests. Walter's Estate was composed entirely of such community property and his estate was distributed in accordance with the provisions of decedent's will (R. 18, 19, Stip. par. 4).

Under decedent's will decedent's wife had the power to withdraw 50 per cent of Walter's Estate. She exercised

²Exhibits 5 and 6 to the stipulation are printed in the transcript of the record; Exhibits 1-4 and 7 are contained in the record on appeal but not printed in the transcript due to the lengthy nature of the materials involved.

that power on May 8, 1941, and assigned the property to the Crocker First National Bank of San Francisco to hold as trustee under a trust agreement (R. 18, Stip. par. 3, Ex. 4).

Included in the gross income of the 1941 fiduciary income tax return of Walter's Estate was \$19,690.65. This amount represented one-half of the income attributable to the property subject to administration in Walter's Estate for the period from January 1, 1941, to August 26, 1941. The return showed an income tax due of \$3,815.44 which tax was paid in full (R. 19, Stip. par. 5). The other half of the income for this period attributable to the property subject to administration in Walter's Estate was reported on the last income tax return filed for decedent's wife. This return was for the period from January 1, 1941, to November 24, 1941, on which latter date decedent's wife died (R. 19, Stip. par. 6). The taxpayer for this period is hereinafter referred to as "Emily A. Gibson, deceased."

In a report dated November 6, 1944, the Internal Revenue Agent in Charge at San Francisco proposed adjustments to the return filed by Walter's Estate. The major adjustment was based upon the agent's determination that all the income attributable to property subject to administration in the estate from January 1, 1941, to August 26, 1941, should be reported by the estate for income tax purposes. Under this adjustment the half of the income from property subject to administration reported in the return of decedent's wife (\$19,690.65) was added to the taxable income of Walter's Estate for the period involved (R. 19, 20, Stip. par. 9). On November 6, 1944, the same

Revenue Agent issued a thirty-day letter advising Emily A. Gibson, deceased, that there had been an overassessment of income taxes due from her for the period from January 1, 1941, to November 24, 1941. One of the adjustments proposed in the letter was a reduction in taxable income in the sum of \$19,690.65 (R. 20, Stip. par. 8).

On January 22, 1945, the Commissioner of Internal Revenue (hereinafter referred to as the "Commissioner") wrote the executors of the Estate of Emily A. Gibson, deceased (hereinafter referred to as "Emily's Estate"), proposing that the overpayment apparently due to Emily A. Gibson, deceased, be applied against the deficiency apparently due from Walter's Estate (R. 21, Stip. par. 9, Ex. 5). The executors of Emily's estate ultimately consented to have the overpayment credited against the deficiency due from Walter's Estate (R. 21, Stip. pars. 9 and 10, Ex. 6). Emily's Estate was subsequently reimbursed by Walter's Estate for the amount thus credited against the deficiency (R. 23, Stip. par. 12, Ex. 6).

The manner in which the deficiency plus interest of \$10,708.82 which was charged against Walter's Estate was ultimately paid is set forth in paragraph 11 of the stipulation (R. 22). The deficiency plus interest paid by Walter's Estate was chargeable to the beneficiaries or transferees of the beneficiaries under the will of decedent as follows:

50% thereof to Crocker First National Bank of San Francisco, as transferee of decedent's wife;

12½% to Walter D. K. Gibson, Jr.;

12½% to the Joanne Gibson trust; and

25% to the Grace G. Collins trust (R. 22, Stip. par. 12).

On June 30, 1947, Walter's Estate filed a claim for a refund of the addition tax paid (R. 23, Stip. par. 13). On April 8, 1948, the Internal Revenue Agent in Charge at San Francisco advised Walter's Estate of a report by a representative of that office recommending that the over-assessment be allowed (R. 23, Stip. par. 14). On April 12, 1950, Walter's Estate received a certificate of over-assessment certifying that its income tax for 1941 had been overassessed by \$9,362.58. However, such overassessment was reduced on the certificate by the sum of \$7,100.35, which sum was the amount of a proposed deficiency in tax due from Emily A. Gibson, deceased, and by the further sum of \$201.39, which is not here in dispute (R. 24, Stip. par. 15). Walter's Estate received a check for the net overassessment of \$2,060.84 plus interest (R. 24, Stip. par. 16). On April 13, 1950, the Commissioner notified Walter's Estate that the claim for refund was disallowed to the extent of \$7,100.35 (plus \$201.39, which is not here in dispute) (R. 24, Stip. par. 16).

In the 30-day letter dated January 25, 1949, addressed to Emily A. Gibson, deceased, the taxpayer was advised that a deficiency in income taxes for the period ending November 24, 1941, had been proposed in the amount of \$7,100.35. For an explanation of the adjustments made therein, the letter referred to the report on Walter's Estate which is Exhibit 7 attached to the stipulation. The proposed deficiency was due to a determination by the Revenue Agent that one-half of the income received by the executor of Walter's Estate during said period was taxable to Emily A. Gibson, deceased (R. 25, Stip. par. 17). Taxpayer Emily A. Gibson, deceased, protested said

proposed deficiency on the ground that the statute of limitations had expired and that section 3801 of the Internal Revenue Code of 1939 providing an extended statute of limitations in regard to related taxpayers did not apply. No further steps have been taken by the Internal Revenue Agent in Charge at San Francisco subsequent to the protest of Emily A. Gibson, deceased (R. 25, 26, Stip. par. 18). Thus no statutory notice of deficiency has ever been issued by the Commissioner against Emily A. Gibson, deceased, or Emily's Estate for the amount of \$7,100.35 to which appellee alleges its rights are superior to those of appellant (R. 26, Stip. par. 19).

Emily's Estate was distributed in accordance with a decree of final distribution entered on January 23, 1947. Walter D. K. Gibson, Jr., and Grace Collins shared equally as residuary legatees of Emily's Estate. They each received cash and assets valued at \$9,717.50 (R. 26, Stip. par. 20).

If the judgment prayed for herein is granted, the refund payable to appellant will be distributed in accordance with paragraphs 9 and 12 of the decree of final distribution of Walter's Estate dated August 26, 1941 (R. 26, Stip. par. 21, Ex. 3). A distribution according to the terms of said paragraph 9 is summarized in the supplemental stipulation of facts (R. 33).

The parties have agreed that the amount of tax in dispute, exclusive of interest, is \$7,100.35 (R. 28, Stip. par. 24).

SPECIFICATION OF ERRORS.

The District Court erred:

1. In holding that the election by Emily A. Gibson to waive her community property right and take according to the will changed the character of the community interest upon the death of her husband and the entire community property became the estate of the husband.

2. In holding that the Commissioner properly determined in accordance with law that the executor of the estate of Walter D. K. Gibson, deceased, was liable for income taxes based upon the entire net income of the estate for the period from January 1, 1941, to August 26, 1941.

3. In failing to hold upon the facts and the law that one-half of the net income received by the estate of Walter D. K. Gibson, deceased, for the period from January 1, 1941, to August 26, 1941, was taxable to the executor of said estate, and that one-half of the net income was taxable to Emily A. Gibson.

4. In entering judgment that the appellant's complaint and cause of action therein be dismissed.

SUMMARY OF THE ARGUMENT.

1. Under the controlling authorities only one half of the income of Walter's Estate is taxable to the estate. The decision by this Court in *Bishop v. Commissioner*, 152 F.2d 389 (1945), requires a reversal of the District Court's judgment. In the *Bishop* case this Court held that one-half of the income received by the husband's estate was

taxable to the surviving widow where all the property of the estate was community property in which husband and wife had held present and equal interests. The fact that the wife's share of the community property was subject to administration in the husband's estate did not change this result. In the case at bar, Walter's Estate was composed of community property in which decedent and decedent's wife had held present and equal interests. Decedent's wife consented to take under decedent's will. It is appellant's position that the election by decedent's wife is not binding upon her under California law. But even if this Court should hold the election binding, decedent's wife retained the power to withdraw one-half of the estate subject to administration, and she exercised that power. Therefore, decedent's wife in the case at bar had the same power over her one-half of the community property subject to administration in Walter's Estate as did the surviving wife in the *Bishop* case. Thus the *Bishop* case, and other authorities cited in the argument, require a decision for appellant.

2. As an alternative defense appellee avers that if appellant has the right to recover under the applicable law, still its recovery should be denied under the doctrine of equitable recoupment. That doctrine does not apply in this case. The Supreme Court has given the doctrine an extremely narrow application which would prevent its application here. Furthermore, other decisions prevent the application of equitable recoupment here because, (1) the Commissioner was guilty of laches in failing to assess a tax against Emily A. Gibson, deceased, and (2) there is a lack of identity of the parties

as between the beneficiaries of Walter's Estate and the beneficiaries of Emily's Estate. Finally, specific provisions of the Internal Revenue Code prevent the application of the doctrine of equitable recoupment in this case.

ARGUMENT.

I.

ONLY ONE-HALF OF THE INCOME IS TAXABLE TO WALTER'S ESTATE UNDER THE DECISION IN *BISHOP* v. COMMISSIONER.

A. The Bishop Case.

It is the position of the appellant that the decision by this Court in *Bishop v. Commissioner*, 152 F.2d 389 (1945), is controlling in the case at bar.

In the *Bishop* case the husband died on December 20, 1938. At that time the husband and wife owned community property acquired by them while living in California, and in which at the time of the decedent's death each had "present, existing and equal interests." In the case at bar at the time of decedent's death decedent and decedent's wife each had present, existing and equal interests in community property acquired in California (R. 18, 19, Stip. par. 4).

The principal question in the *Bishop* case was whether during the period of administration of the estate the surviving widow was entitled to report one-half of the income received by the estate from the community property which had been accumulated by the husband and wife. The Court emphasized the following two provisions of the California Probate Code:

Section 201, which provides in part:

“Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent * * *.”

Section 202, which provides in part:

“Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration * * *.”

The Court held that the wife was entitled to report one-half of the income from the property held by the estate which had formerly been the community property of the husband and wife. The Court's reasoning was stated succinctly as follows:

“Being the owner of a one-half interest in the community property, petitioner (wife) owned one-half of the income therefrom. Since ownership is the test of taxability, petitioner's half of the \$4,563.40 was taxable to her, not to the estate.”

The Court also noted that the wife's one-half of the community property never became a part of the husband's estate, citing *United States v. Goodyear*, 99 F.2d 523 (9th Cir. 1938) and *Overton v. Sampson*, 138 F.2d 417 (9th Cir. 1943). In those cases the Court held that only one-half of California community property in which husband and wife had present, existing and equal interests was includible in the husband's gross estate for estate tax purposes. As will be discussed later, the same rule has been applied even though the wife elected to take under the husband's will. See *The Pacific National Bank*

of *Seattle, Executor*, 40 BTA 128 (1939), acq. 1939-2 CB 28, discussed *infra*, page 18.

The *Bishop* case has been followed in cases considering the community property laws of several other states.

Blackburn's Estate v. Commissioner, 180 F.2d 952 (5th Cir. 1950) (Texas);

Estate of J. T. Sneed, Jr., 17 T.C. 1344 (1952), aff'd 220 F.2d 313 (5th Cir. 1955) (Texas);

United States v. Merrill, 211 F.2d 297 (9th Cir. 1954) (Washington), overruling *Commissioner v. Larson*, 131 F.2d 85 (9th Cir. 1942).

The Internal Revenue Service has announced recently that it will now apply the rule of the *Bishop* case to all states with community property laws similar to those of California.

Revenue Ruling 55-726, Internal Revenue Bulletin No. 51, p. 6 (Dec. 19, 1955).

In the present case the parties have stipulated that:

“At the date of death all of the property owned by decedent and all of the property owned by decedent's wife was community property in which, during the continuance of the marriage relation, decedent and decedent's wife had present, existing and equal interests. Walter's Estate was composed entirely of the property referred to in the foregoing (sentence) * * *” (R. 18, Stip. par. 4).

Therefore, appellant submits that since all of the property of Walter's Estate was community property in which the parties had present, existing and equal interests at the date of decedent's death, the rule of the *Bishop* case is a binding precedent and only one-half of the income

of Walter's Estate should have been taxed to the estate for the period here in question.

B. The Effect of the Waiver Signed by Decedent's Wife.

Before the District Court appellee argued that the *Bishop* case was not controlling because decedent's wife made a binding contract to relinquish her interest in the community property through the waiver which she signed. The District Court adopted appellee's argument (R. 39-42). This argument advanced by the appellee may be answered in a three-fold manner.

In the first place, in construing the effect of the waiver under California law we are required to look at both decedent's will and the waiver. *Estate of Whitney*, 171 Cal. 750, 154 Pac. 855 (1916). In construing both documents it is apparent that there was no binding agreement that the wife give up her interest in one-half of the community property at the husband's death. By the terms of her waiver, decedent's wife accepted the terms of decedent's will and waived her right to claim one-half of the community property (Ex. 2). However, under the terms of decedent's will, all of his estate³ was transferred to the Emily A. Gibson Trust Estate and the will stated:

"My said wife shall also be entitled to withdraw such portions of the corpus of said Emily A. Gibson Trust Estate (not exceeding, however, in all one-half ($\frac{1}{2}$) of the amount of the corpus thereof) from time to time and for any purpose as she may desire" (Ex. 1).

³All of Walter's Estate was distributed to the Emily A. Gibson Trust Estate with the exception of certain small bequests which it is stipulated "may be disregarded in this proceeding" (R. 18, Stip. par. 3).

Thus under the waiver decedent's wife agreed to take under decedent's will and to give up her interest in one-half of the community property, but under the terms of the will, which was also a part of her agreement, she had the unconditional right to withdraw one-half of Walter's Estate at any time. Furthermore, decedent's wife did withdraw one-half of Walter's Estate on May 8, 1941, prior to the date of final distribution of the estate (R. 18, Stip. par. 3). In summary, then, decedent's wife had the right to revoke her agreement at any time and withdraw her consideration. Under those facts the so-called waiver contract lacked mutuality of obligation and consideration and was therefore unenforceable.

Thus in *Shortell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 277 Pac. 519 (1929), the plaintiff signed an agreement and deposited \$2,500 to purchase lots by reference to an unrecorded map, the defendant seller to furnish a contract of sale or deed when the map was recorded. Defendant seller also reserved the right to return the money at any time before a contract of sale was entered into between the parties and thereby revoke the agreement. Plaintiff sued for the full recovery of his deposit on the ground that the agreement was unenforceable. The Court held for the plaintiff on the ground that the agreement lacked consideration and was unenforceable because the defendant could revoke it at any time.

In *Naify v. Pacific Indemnity Co.*, 11 C.2d 5, at page 11 (1938), the Court recognized this rule of contract law stating:

“* * * a contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void.”

A further statement of the law is contained in *County of Alameda v. Ross*, 32 C.A.2d 135, at page 145, 89 P.2d 460 (1939), where the Court said:

“It has been frequently held that agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party (citing a number of cases).”

See also: Restatement of Contracts, sec. 79.

Thus in the present case there was no binding agreement entered into between decedent and decedent's wife because decedent's wife gave no consideration. Decedent's wife could retake her consideration at any time and in fact she did. Since the agreement is not an effective contract, the interest of decedent's wife in her one-half of the community property was in no way affected by the so-called waiver agreement. Thus the interest of decedent's wife was the same as that of the wife in the *Bishop* case, and that case requires that one-half of the income from Walter's Estate be taxed to decedent's wife.

C. One-half of the Income of Walter's Estate Should Be Taxed to Decedent's Wife Even If the Waiver Is Binding.

Even if the Court should find that the waiver signed by decedent's wife is binding upon her, one-half of the income from Walter's Estate is nevertheless taxable to the wife. Again it is necessary to determine, under the rule of the *Bishop* case, where control of the community interest of decedent's wife resides. It is a fact that decedent's wife had the right to withdraw one-half of

Walter's Estate at any time and that she did withdraw one-half of Walter's Estate on May 8, 1941 (R. 18, Stip. par. 3, Exs. 1 and 2). The one-half of Walter's Estate over which decedent's wife had complete control was subject to administration in the husband's estate, but that fact does not make the property in any way different from a wife's one-half of the community property, for her community interest is also subject to administration in the deceased husband's estate. See section 202, California Probate Code, quoted above. The basic "test of taxability" said the Court in the *Bishop* case is that of ownership or control. In the *Bishop* case the Court held that the wife owned one-half of the community property after her husband's death because when the community terminated at the death of the husband California Probate Code section 201, quoted above, gave the wife that ownership. And in the present case, even if the Court should hold that decedent's wife effectively relinquished her community interest, still by contract (construing the waiver of decedent's wife and decedent's will together) she obtained ownership and control of one-half of Walter's Estate. Therefore, under the "test of taxability" of the *Bishop* case one-half of the income of Walter's Estate is taxable to decedent's wife.

Furthermore, if the Court should find the waiver to be binding upon decedent's wife there is an additional reason for taxing one-half of the income from Walter's Estate to decedent's wife. Decedent's wife controlled one-half of the community property down to the date of decedent's death for the waiver was only effective "upon his death prior to my decease" (Ex. 2). If the waiver is effective,

a proper analysis of the facts would show that at the date of decedent's death, his wife contributed her one-half of the community property to the testamentary trust set forth in decedent's will. In effect, she was a co-trustor of the trust in regard to her one-half of all the community property and decedent was a co-trustor in regard to his one-half of all the community property. Decedent's will which described the trust, and to which decedent's wife agreed, gave decedent's wife the right to withdraw one-half of the corpus of the trust. Thus, in effect, decedent's wife could at any time revoke her contribution to the trust.

From the time of the Revenue Act of 1924, federal income tax law has provided that where the grantor of a trust has the power to revoke the trust, the income of the trust is taxable to the grantor. See, *e.g.*, section 166, Internal Revenue Code of 1939; section 676(a), Internal Revenue Code of 1954. Section 166, Internal Revenue Code of 1939 was controlling for that part of the year 1941 which is here in controversy, and it provides:

“Sec. 166. *Revocable Trusts.*

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor.”

Therefore, one-half of the income of the testamentary trust, which trust for the purposes of this case comprises the whole of Walter’s Estate, must be taxable to decedent’s wife.

This analysis of the effect of the waiver, if the Court finds that the waiver is binding, is borne out by two decisions of the Board of Tax Appeals construing the effect of waivers under the federal estate tax, and by California probate law.

In *The Pacific National Bank of Seattle, Executor*, 40 BTA 128 (1939), acq. 1939-2 CB 28, husband and wife had accumulated community property in the State of Washington. The wife signed the following statement on the same day her husband signed his will:

“* * * I hereby elect to and do accept * * * said Will and all of its provisions, including disposition at the death of my said husband of all our community property thereunder, and hereby waive all claims to my share of any community property * * *.”

The Commissioner argued that by signing such a statement the wife transferred her community property to her husband during her lifetime and, therefore, the wife’s share of the community property must be included in the husband’s gross estate in computing the federal estate tax. The Board held, however, that the wife’s share of the community property was not includible in the husband’s gross estate. The wife’s transfer of her share of the community property was only effective on the hus-

band's death. At that time the wife's interest passed directly from her to the trust established by the husband's will and was never a part of the husband's taxable estate. The Board reaffirmed its previous holding in *Coffman-Dobson Bank & Trust Co.*, 20 BTA 890 (1930), acq. X-1 CB 13 (1931). Thus under those decisions the Board of Tax Appeals held that the community interest of the wife passed at the husband's death directly from the wife and never became a part of the husband's taxable estate. The Commissioner acquiesced in both decisions and has never withdrawn either acquiescence.

These decisions are in accord with the probate law of the State of California. In this State the testamentary trust comes into existence and the legal title to the property included therein vests in the trustee at the death of the testator; a decree of distribution of the estate to the trustee operates merely to confirm such title in the trustee.

California Probate Code, secs. 28, 300;

Estate of Lefranc, 38 C.2d 289, 297, 239 P.2d 617 (1952);

Estate of Wellings, 192 Cal. 506, 510, 221 Pac. 628 (1923);

Estate of O'Connor, 2 Cal.App. 470, 84 Pac. 317 (1905).

Furthermore, the equitable interests of the trust beneficiaries come into existence at the testator's death.

Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 Pac. 14 (1923).

Thus the testamentary trust in the present case came into existence at the time of the testator's death and was

ready to receive a transfer of community property from the wife at that time. Of course, the trust property is subject to administration in the husband's estate. California Probate Code, section 202, quoted above. But this does not diminish the fact of control by decedent's wife, for, as the *Bishop* case recognized, the wife's share of the community property is always subject to administration in the husband's estate and yet the income from the wife's community interest is taxable to her during administration of the husband's estate.

The above resume of the two Board of Tax Appeals' decisions and the applicable California probate law clarifies the law in regard to the present proceeding. For even if the Court should find the waiver signed by decedent's wife to be an effective agreement, still under the rationale of the Board decisions, fully supportable under California law, the community interest of decedent's wife only passed from her at decedent's death directly to the testamentary trust set forth in decedent's will and never became a part of decedent's taxable estate. And, if the fact is added that in the present case decedent's wife never lost control or ownership of one half of the trust corpus, the conclusion is inescapable that decedent's wife must be taxed on one-half of the income from Walter's Estate under section 166, Internal Revenue Code of 1939, which taxes to the grantor the income of a revocable trust.

Thus if the Court should determine that the waiver, signed by decedent's wife, and decedent's will constitute together a binding agreement, nevertheless, one-half of the income from Walter's Estate is taxable to decedent's wife. This result must follow because decedent's wife owned

one-half of Walter's Estate to the same extent and degree as the wife in the *Bishop* case owned one-half of the community property after her husband's death. Furthermore, decedent's wife was a co-trustor of the trust set forth in decedent's will with a power to revoke her contribution.

The District Court was of the opinion that the right of decedent's wife to withdraw 50 per cent of Walter's Estate was not effective to give her an interest in the estate similar to that of the wife in the *Bishop* case because in the present case "under no circumstances could the wife obtain any ownership or control until a distribution was effected on the estate of her husband" (R. 41). As we have demonstrated above, however, the District Court's rationale in regard to the power to withdraw is in error for two reasons. In the first place, decedent's wife owned one-half of the property subject to administration in Walter's Estate before his death and an interest equivalent to ownership in one-half of the property after his death. Secondly, the fact that the interest of decedent's wife was subject to administration in Walter's Estate, so that decedent's wife could not "control" it until distribution of the estate, is not of importance. The community property interest of the wife in the *Bishop* case was also subject to administration in her husband's estate and she could not "control" it until distribution. This Court recognized this fact in the *Bishop* case, but held it was not determinative. Thus the District Court did not properly apply the holding in the *Bishop* case, and, therefore, its judgment should be reversed.

II.

THE DEFENSE OF EQUITABLE RECOUPMENT.

As an alternative defense in its answer appellee avers that its right to retain the amount for which the appellant is suing in this action is superior to any right asserted by appellant. The basis for appellee's claim seems to be that: (1) The statute of limitations had run against any assessment which might be made against Emily A. Gibson, deceased; (2) the beneficiaries of Walter's Estate and of Emily's Estate are substantially the same; and (3) therefore, any recovery by appellant would redound to the benefit of the beneficiaries of Emily's Estate, which beneficiaries would have borne the burden of the tax which the Commissioner should have assessed against Emily A. Gibson, deceased.

A. The Narrow Scope of the Doctrine of Equitable Recoupment.

There is no statutory authority for the doctrine of equitable recoupment. The doctrine is based primarily on two Supreme Court cases, *Bull v. United States*, 295 U.S. 247 (1935), and *Stone v. White*, 301 U.S. 532 (1937). A brief discussion of the two cases will illustrate how the doctrine was applied. In *Bull v. United States*, *supra*, the estate of a deceased partner received a share of the partnership profits during the year 1921. The Commissioner treated the profits so paid in 1921 as part of the corpus of his estate and an estate tax was paid thereon. In 1925 the Commissioner determined a deficiency in income taxes against the estate on its share of the 1921 partnership profits. The estate claimed that the 1925 assessment was erroneous but the claim was rejected in 1928. By

this time the statute of limitations had run against the estate's right to sue for a refund on the estate taxes paid on 1921 income. Thus the estate paid the 1925 income tax assessment under protest and sued for a refund claiming that if the income tax assessment was correct and the estate tax assessment was erroneous, it had a right to recoup the estate tax. The Supreme Court upheld the taxpayer's contention, holding that the 1925 assessment of income taxes was the correct one, but that the estate tax paid in 1921 could be recouped.

In *Stone v. White, supra*, a testator left property in trust with his wife as sole income beneficiary. The beneficiary did not include the income paid to her in her taxable income, nor did the trustees pay tax on the income. The Commissioner, relying on the prevailing authorities at that time, determined a deficiency against the trustees which was paid. Thereafter the Supreme Court, at a time when an assessment against the beneficiary was barred by the statute of limitations, held in another similar case that the income was taxable to the beneficiary and not to the trust. The trustees in the *Stone* case thereupon brought a suit for refund and the Collector interposed the defense that the tax which should have been paid by the beneficiary exceeded that paid by the trustees, and that if any recovery would inure to the advantage of the beneficiary, the Collector could set off the tax due from her. It was shown that the trustees paid the tax out of trust income and under the trust a recovery by the trustees would go directly to the beneficiary. The Supreme Court held that the Collector could recoup the tax due from the beneficiary, stating that here

the trustee and beneficiary might be treated as a single entity.

The doctrine of equitable recoupment as enunciated in the two Supreme Court cases above mentioned, has been severely limited by succeeding Supreme Court and lower Court decisions. The right of the government to rely on equitable recoupment as a defense was almost eliminated by *McEachern v. Rose*, 302 U.S. 56 (1937). There the Court refused to permit the government to recoup a barred deficiency for 1928 against overassessments of the same taxpayer for 1930 and 1931. The Court relied on sections 607 and 609, Revenue Act of 1928, which have been carried into sections 3770(a)(2) and 3775(a), Internal Revenue Code of 1939; sections 6401(a) and 6514(b), Internal Revenue Code of 1954. It is true that the Court in *Stone v. White*, *supra*, refused to apply these sections on the ground that they pertain only to a case where the underpayment and overpayment were made by one taxpayer rather than two taxpayers as is the case in *Stone v. White* and the present case. However, the effect of *McEachern v. Rose* was practically to eliminate the doctrine of equitable recoupment as a defense available to the government in a case where the underpayment and overpayment related to one taxpayer.

The availability of the doctrine of equitable recoupment to the taxpayer suing for a refund has also been severely limited by the Supreme Court. In *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946), the Court refused to permit a taxpayer to offset barred overpayments of federal excise taxes paid for the years 1919 through 1922 against income taxes for the year 1935.

After reviewing the holdings in *Bull v. United States*, *supra*, and *Stone v. White*, *supra*, the Court emphasized that the doctrine of equitable recoupment was not to be extended beyond the facts of those cases.

As a further limitation, the Supreme Court has held that the Tax Court has no authority to apply the doctrine of equitable recoupment. *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943).

The narrowing effect of the later Supreme Court cases has led Judge Frank of the Second Circuit to say:

“The gap in statutes of limitation created by the recoupment doctrine in tax cases seemed at one time to be fairly wide. But the gap has been narrowed markedly by *McEachern v. Rose* (*supra*) and *Rothensies v. Electric Storage Battery Co.* (*supra*). Frankly, we do not know just how much of that doctrine still lives * * *.”

Wood v. United States, 213 F.2d 660 (1954), *aff'g* 121 F.Supp. 764 (S.D. N.Y. 1953).

For a general discussion of the doctrine of equitable recoupment see, Mintz and Plumb, “*Taxing Income in Years Not Realized Under Doctrine of Equitable Estoppel*,” 1954 *Tax Institute, University of Southern California, School of Law*, 481, 504-506, 513-515.

The Supreme Court cases above discussed show that the doctrine of equitable recoupment is not to be extended beyond the fact situations contained in *Bull v. United States*, *supra*, and *Stone v. White*, *supra*. The fact situation in the present case is not at all analogous to the facts of those two Supreme Court cases. Therefore, the defense of equitable recoupment is not available in this

case as the following lower Court decisions construing the Supreme Court decisions conclusively show. Those lower Court decisions set forth two principal reasons for the inapplicability of the doctrine in this case: (1) The Commissioner neglected to assess the tax which he is attempting to recoup against Emily A. Gibson, deceased, when he had a reasonable time within which to make the assessment; and (2) there is not the necessary identity of parties as between the beneficiaries of Walter's Estate and the beneficiaries of Emily's Estate. Appellant further submits that the doctrine of equitable recoupment is not available because the Internal Revenue Code provides the Commissioner with a procedure for assessing and collecting the tax from Emily A. Gibson, deceased, and the Commissioner should be limited to his statutory remedy in a matter of this type. These limitations on the doctrine of equitable recoupment will be discussed in the following paragraphs.

B. The Commissioner's Laches Prevents Application of the Doctrine.

First, it is clear from the facts that the Commissioner had a reasonable time within which to assess the tax against Emily A. Gibson, deceased, and he neglected to act. In this case the Commissioner assessed an additional tax against Walter's Estate in the sum of \$9,161.19 and advised Emily A. Gibson, deceased, that she was entitled to a refund in the sum of \$7,359.84 (R. 19, 21, Stip. pars. 7 and 10). The overassessment due Emily A. Gibson, deceased, was ultimately paid by crediting that amount against the deficiency due from Walter's Estate which transaction occurred on July 11, 1945 (R. 22, Stip. par.

11). On the same day Walter's Estate reimbursed Emily's Estate (R. 22, Stip. par. 12). In effect, therefore, Emily A. Gibson, deceased, received a tax refund on July 11, 1945. Under section 3746(b), Internal Revenue Code of 1939, the Commissioner had two years, or until July 11, 1947, within which to collect this erroneous refund. The case of *Bishop v. Commissioner, supra*, was decided by the Ninth Circuit on December 10, 1945. The Commissioner did not apply for certiorari in the case and, therefore, it represented a final decision determining that one-half of the income from this estate should be taxed to decedent's wife. The Commissioner had approximately 18 months after the *Bishop* decision to collect the tax erroneously paid to Emily A. Gibson, deceased. However, he failed to take any steps to collect the tax or to protect himself against the bar of the statute of limitations. The following cases clearly demonstrate that such laches on the part of the Commissioner, a factor not present in *Stone v. White, supra*, prevents the appellee from successfully asserting the doctrine of equitable recoupment.

In *McNaghten v. United States*, 17 F.Supp. 509 (Ct. Cl. 1937), the Commissioner had assessed a tax based on distributions from a trust to two beneficiaries each in the amount of \$430,000. The trust beneficiaries sued for refunds on the ground that under state law there was only a taxable distribution of \$354,000 to each of them. The Court found for the beneficiaries on this claim. The government asserted a second defense, however, based on the fact that the trust should have paid the tax in the case of both beneficiaries on the excess over \$354,000, but that collection of the tax from the trust was barred by the

statute of limitations. Therefore, the government argued that the amount of tax which should have been paid by the trust could be recouped against the refund otherwise owing to the beneficiaries. The Court refused to allow recoupment, stating as follows:

“* * * under the facts and circumstances of this case, we find no justification for the application of the equitable principle for which defendant’s counsel contends. In the case of *White v. Stone et al.*, supra, the Commissioner determined and assessed the tax there involved in accordance with the decision of the Circuit Court of Appeals for the circuit in which the taxpayer resided, which decision was later reversed, while in the case at bar the Commissioner was bound by no interpretation of the law, except his own, with respect to the question before him. *Moreover, all the facts necessary to a determination and assessment of taxes against the trustees and the beneficiaries of the Arthur Letts Trust were before him and fully known by him on and prior to July 1, 1930, about 8½ months before any statute of limitation would run against the legal assessment of any tax for 1927 against the trustees. He simply neglected properly to assess the tax and permitted the limitation statute to run. There were no representations of any kind by plaintiffs that misled, or could have misled, the Commissioner, and there is no basis for estoppel*” (p. 515, Italics supplied).

The *McNaghten* case was followed in *Benfield v. U.S.*, 27 F.Supp. 56 (Ct.Cl. 1939), where a widow sued for a refund of income tax paid on annuities received from a trust set up by her husband’s will for that purpose. The annuities were composed partly of trust corpus and partly

of trust income. The Court held that the annuities were in the nature of a legacy and not taxable to the widow, and refused to allow recoupment of the barred tax due from the trustees against the refund otherwise owing to the widow. Before collection of the tax due from the trustees was barred, the Commissioner had notified the widow in a 30-day letter that there had been an overassessment of income tax and she was advised to file a claim for refund, which claim was rejected when filed. These facts the Court thought brought the case within the rule of the *McNaghten* case, in that the Commissioner assessed the wrong taxpayer even though he had full knowledge of all the facts.

Again, in *Wood v. United States, supra*, the District Court emphasized the failure of the Commissioner to act in a timely fashion where an adverse decision was rendered against him. The *Wood* case involved a taxpayer's suit for a refund of income taxes for 1944 against which the Commissioner was attempting to recoup a deficiency in plaintiff's tax for 1945, assessment of which was barred by the statute of limitations. The District Court noted that the case which formed the authority for taxpayer's right to a refund for 1944 as well as Commissioner's right to a deficiency assessment for 1945 was first decided by the Tax Court on June 2, 1948 (*Christian W. Korell*, 10 T.C. 1001, aff'd 176 F.2d 152 (2nd Cir. 1949), aff'd 339 U.S. 619 (1950)). The time within which the Commissioner could have assessed a deficiency expired on April 6, 1949. The Court noted: "However, nothing appears to have been done to keep open the matter of this taxpayer's proper income tax for the year 1945"

(p. 767). On a consideration of the whole case the District Court denied the major part of defendant's claim for recoupment and the rest of defendant's claim was denied on appeal.

A similar problem was considered in *United States v. S. F. Scott & Sons, Inc.*, 69 F.2d 728 (1st Cir. 1934), where the government relied on the same type of defense but called it "estoppel" rather than "equitable recoupment." Here a business was operated as a sole proprietorship until June 28, 1919, when it was incorporated. The Commissioner assessed taxes on the income earned for 1918 against the corporation and granted a refund to the former individual owner who had paid taxes on the 1918 income of the business. The corporation sued for a refund. The government eventually conceded that the former individual owner and not the corporation should have been taxed for 1918, but argued against a refund to the corporation on the ground that the statute barred an assessment against the former owner and thus if a refund was allowed no tax would be paid on the 1918 income. The Court rejected the government's defense based on the contention that no tax would be paid on 1918 income because "such a result (was) due to a misinterpretation of the law and its own laches in failing to bring suit to recover a refund erroneously made by one of its officials" (p. 732).

C. Lack of Identity of the Parties Prevents Application of the Doctrine.

Second, the following cases conclusively show that the lack of identity of the parties as between the beneficiaries of Walter's Estate and the beneficiaries of Emily's Estate

prevents the application of the defense of equitable recoupment. As stated heretofore, the earlier cases in which the Supreme Court permitted the application of the doctrine of equitable recoupment were cases where the parties who would bear the burden of paying a double tax on specified income or who would receive the benefit of a refund which would mean that no tax would be paid on specified income were the *same person or entity*. Thus in *Bull v. United States, supra*, the estate had to pay both an estate tax and an income tax on specified income, and in *Stone v. White, supra*, any refund would have inured directly to the trust beneficiary who would have had to pay the tax on the income but for the statute of limitations.

In the present proceeding Walter D. K. Gibson, Jr., and Grace Collins are equal residuary legatees of Emily's Estate (R. 26, Stip. par. 20).

If a judgment is rendered for the appellant herein, the refund thereby payable to appellant will be distributed as follows:

(a) One-half in trust to the Crocker First National Bank of San Francisco (Grace Collins and Walter D. K. Gibson, Jr., being the life income beneficiaries with powers of appointment and the trust providing for takers in default of appointment);

(b) One-eighth outright to Walter D. K. Gibson, Jr.;

(c) One-eighth in trust to Joanne Gibson, net income payable to her until she reaches age 30 when she will receive the corpus; and

(d) One-fourth in trust to Grace Collins, net income payable to her during her lifetime with remainders over

(R. 33, Supplemental Stip. par. 2, amending Stip. par. 21). Thus, the beneficiaries of Walter's Estate and Emily's Estate lack substantial identity. Only in the case of Walter D. K. Gibson, Jr., is there an outright transfer from Walter's Estate (one-eighth interest) and also from Emily's Estate. The other parties having an interest in Walter's Estate are two trusts in which Walter D. K. Gibson, Jr., and Grace Collins are life beneficiaries, and Joanne Gibson, who has no interest in Emily's Estate. Such a lack of identity clearly prevents the application of the doctrine of equitable recoupment.

In *Benfield v. U. S.*, *supra*, the Court refused to apply the doctrine of equitable recoupment in a case involving facts close to those in the present proceeding. In the *Benfield* case a widow sued for a refund of income tax paid upon annuities received from a trust set up by her husband's will for that purpose. The Court held that the annuities were not taxable to the widow and refused to allow recoupment of the barred tax due from the trustees against the refund otherwise owing to the widow. One ground for the Court's decision, previously discussed, was that the Commissioner had failed to act in a timely fashion against the trustees who should have paid the tax. A second ground for refusing to apply the doctrine of equitable recoupment was the lack of identity of the parties. Pending the decision in the widow's refund action, the widow had died. The beneficiaries of the widow's estate were her three children. The beneficiaries of the husband's estate were the same three children, the issue of two of the children, and two other parties. The husband's estate should have paid the tax and therefore

the beneficiaries of his estate would have borne the burden of the tax but for the statute of limitations. Thus, the refund claimed on behalf of the widow would benefit the three beneficiaries who were also beneficiaries of the husband's estate which should have paid the tax. The fact situation, therefore, is close to that in the case at bar except that here the husband's estate is asking for the refund.

The Court noted that the beneficiaries of the husband's estate and the wife's estate were not the same and stated that this lack of identity was a ground for refusing to apply the doctrine of equitable recoupment. The Court said, "If this suit is successful, the recovery will go to the heirs of (the widow's) estate and the beneficiaries of her estate are a part but not all of the beneficiaries of the estate of James Harrington Walker (the husband). These facts show merely an undetermined advantage derived through the failure of the trustees of James Harrington Walker to pay the tax, which is insufficient to warrant the application of the doctrine of equitable estoppel" (27 F.Supp. 859). In refusing to follow *Stone v. White, supra*, because of the lack of identity of the beneficiaries, the Court cited *Schlemmer v. U. S.*, 94 F.2d 77 (2nd Cir. 1938), and *Sewell v. United States*, 19 F.Supp. 657 (Ct.Cl. 1937).

In the *Schlemmer* case the plaintiff and X, together with their wives, were stockholders of the corporation. The plaintiff and X were also officers and directors of the corporation and in the year 1927 they voted themselves each a salary of \$30,000. The corporation could not pay the compensation, however, and sometime late in 1927

or early in 1928 the corporation gave plaintiff and X each a note for \$30,000. Except for \$3,000 paid to plaintiff in 1929 the notes were never paid. Both the corporation and the plaintiff were on the cash basis. However, for the year 1928 the corporation deducted the amount of both notes from its income and the plaintiff reported his note as income and paid the tax thereon. The plaintiff later brought this suit for a refund of the tax so paid.

The Court held for the plaintiff. The note did not constitute income to the plaintiff because the parties did not intend it to be the payment of the corporation's debt. The government argued, however, that the equitable recoupment theory of *Stone v. White*, *supra*, should prevent recovery by the plaintiff because if plaintiff should not have reported the note as income, the corporation should not have deducted the note from its gross income and the statute of limitations had run against assessing the corporation. The Court, per Judge Learned Hand, held that the doctrine of *Stone v. White* was not applicable in this case. In the *Stone* case "the tax was due from the beneficiary in one form or another, and it was unfair to allow the trustee to recoup himself for the beneficiary's account. Here, however, we cannot say on whom the tax due from the company would have fallen, if the notes had not been deducted." The Court noted that plaintiff would have paid some part of it because he was a stockholder, but there were other stockholders in the corporation and creditors also. The Court continued:

"Of course, it may be possible to figure out just how much the plaintiff will gain by this refund, were all the facts before us; which they are not. But, if they

were, we do not read *Stone v. White* * * * as meaning that in such a case the creditor must submit to a set-off, so computed. The trustee was there for practical purposes the beneficiary in other clothes; we do not believe that the eventual incidence of the tax which has been lost, may be traced back, however indirectly, to the taxpayer in court so that his recovery shall be diminished pro tanto."

In *Sewell v. United States, supra*, the wife was the beneficiary of the husband's testamentary trust and was entitled to part of the trust income for life, the remaining income to be accumulated and added to the corpus. For the year 1937 part of the income was distributed to the wife and the trustee paid a tax thereon out of income which otherwise would have been accumulated. Later Court decisions determined that the wife should have paid the tax and the trustee sued for a refund. The government defended on the ground of equitable recoupment because the wife, who should have paid the tax, was protected from assessment by the statute of limitations. The Court refused to apply the doctrine of equitable recoupment, however, on the ground that the refund would become part of the trust corpus and would never actually be received by the wife. Thus, the doctrine of equitable recoupment as enunciated by *Stone v. White, supra*, would not apply.

A similar decision was rendered in *Proctor v. White*, 28 F. Supp. 161 (D. Mass. 1939), where the husband was a one-sixth income beneficiary in the wife's estate. The executors sued for a refund of taxes paid on the income received by the husband who should have paid the tax but who could not be required to because of the statute of

limitations. In regard to a refund which would go to the corpus of the estate the Court said:

“The most profit that Proctor (the husband) would receive would be his 1/6 share of the income from the sum returned for his life under the terms of the will.”

The husband's interest in the refund was not sufficient to invoke the doctrine of equitable recoupment.

D. Internal Revenue Code Procedures Supersede Equitable Recoupment.

A third reason for the inapplicability of the doctrine of equitable recoupment in this case is found in specific provisions of the Internal Revenue Code of 1954, sections 1311-1314, which set forth a procedure for the Commissioner to use in collecting taxes from “related taxpayers” such as Emily A. Gibson, deceased. Under the facts, Emily A. Gibson, deceased, was advised in a 30-day letter dated January 25, 1949, that a deficiency in income taxes for the period ended November 24, 1941, had been proposed in the amount of \$7,100.35 (R. 25, Stip. par. 17). Emily A. Gibson, deceased, protested said proposed deficiency on the grounds that the statute of limitations had expired and that section 3801 of the Internal Revenue Code of 1939 providing an extended statute in regard to related taxpayers would not apply to her. Thereafter, the Internal Revenue Agent in Charge at San Francisco made the following conclusions in regard to the proposed deficiency against Emily A. Gibson, deceased:

“That the report of the examining officer be modified to reflect no deficiency at this time pending the obtaining of a final determination of the income tax

liability of the estate of Walter D. K. Gibson, deceased, for the year 1941'' (R. 25, Stip. par. 18).

No statutory notice of deficiency has ever been issued by the Commissioner against Emily A. Gibson, deceased, or Emily's Estate for the amount of \$7,100.35.

If the appellant obtains a judgment in this case, the Commissioner has the opportunity to proceed against Emily A. Gibson, deceased, or her transferees, under sections 1311-1314 of the Internal Revenue Code of 1954 (the successor sections to section 3801 of the Internal Revenue Code of 1939). These sections of the Code were specifically enacted by Congress to provide an extended statute of limitations in cases where income was erroneously reported by one taxpayer, which income should have been reported by a related taxpayer. This is the statutory method specifically devised by Congress for settling tax liability of a related taxpayer such as Emily A. Gibson, deceased.

It is submitted that since Congress has established a specific legal remedy for the collection of taxes in cases such as this, the appellee has no standing to assert any equitable remedy until it has exhausted its legal remedy.

CONCLUSION.

Appellant submits that the judgment of the District Court should be reversed and the judgment prayed for in its complaint should be granted. This action is governed by the rule of this Court in *Bishop v. Commissioner*,

supra. Furthermore, appellee is not in a position to invoke the doctrine of equitable recoupment, even if such a doctrine still exists in the law of federal taxation.

Dated, San Francisco, California,

June 1, 1956.

Respectfully submitted,

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No. 15,046

IN THE

United States Court of Appeals
For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K.
Gibson, Deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the Judgment of the United States District Court
for the Northern District of California.**

BRIEF FOR THE APPELLEE.

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No. 15,046

IN THE

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For the Ninth Circuit**

WELLS FARGO BANK & UNION TRUST CO.,
Executor of the Will of Walter D. K.
Gibson, Deceased,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the Judgment of the United States District Court
for the Northern District of California.**

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The District Court's findings of fact (R. 44-46) and conclusions of law (R. 46-47) are not officially reported. The District Court's memorandum opinion (R. 37-43) is reported in 134 F. Supp. 340.

JURISDICTION.

This appeal involves federal income tax in the amount of \$7,100.35 (R. 39, 44), assessed against the executor of Walter D. K. Gibson's estate as part

of a deficiency based on such executor's failure to report one-half the income attributable to property subject to administration during the period January 1, 1941, through August 26, 1941. (R. 38.) The assessed deficiency, which amounted to \$9,161.19, plus interest, was paid on July 11, 1945, and January 17, 1947. (R. 9.) Taxpayer executor for the estate of Walter D. K. Gibson, deceased, filed claim for refund in that amount on June 30, 1947. (R. 9, 46.) On April 12, 1950, the claim was allowed by the Commissioner of Internal Revenue, who reduced the amount payable by \$7,100.35, the sum of a proposed deficiency in the tax due from Emily A. Gibson, deceased. (R. 10-11, 46.) The balance of \$2,060.84, plus interest, was paid to taxpayer-executor on April 12, 1950. (R. 46.) On April 13, 1950, the Commissioner notified taxpayer that its claim for refund was disallowed to the extent not previously allowed by the certificate of overassessment of April 12, 1950. (R. 46.) Thereafter, more than six months having elapsed, taxpayer-executor, within the time provided by Section 3772 of the Internal Revenue Code of 1939, instituted this suit for refund (R. 5-13) on April 11, 1952 (R. 13). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. On November 23, 1955, judgment was filed for the United States, dismissing taxpayer-executor's suit for refund. (R. 49.) Within sixty-one days, the sixtieth day having fallen on Sunday, January 22, 1956, taxpayer-executor filed its notice of appeal on January 23, 1956. (R. 49-50.) Accordingly, the amount of federal income taxes here involved is \$7,100.35. (R. 44.) This

Court has jurisdiction conferred by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Whether, as held by the District Court, the income for the period of administration prior to distribution between January 1, 1941, and August 26, 1941, attributable to the property subject to administration in the estate of the husband, Walter D. K. Gibson, was taxable to his estate or, whether, on the other hand, as taxpayer claims, one-half of this income was taxable to the estate of his wife Emily.

2. In the alternative, whether equity requires that any judgment in favor of taxpayer be reduced by the amount that will go to the heirs of Emily Gibson.

STATUTE INVOLVED.

Internal Revenue Code of 1939:

Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 162.)

STATEMENT.

The pertinent facts, as stipulated (R. 17-28, 33-36) and as found by the District Court (R. 37-39, 44-46), can be summarized as follows:

Wells Fargo Bank & Union Trust Company (hereinafter called taxpayer) is the executor of the will (Ex. 1, Appendix, *infra*) of Walter D. K. Gibson (hereinafter called Walter), who died on December 21, 1938. Walter's estate was in the course of administration until August 26, 1941. Under the terms of his will, his property was placed in trust, with his wife Emily being named as the income beneficiary. (R. 37.)

Walter's will was executed on August 31, 1937. (R. 18.) Among other things, it stated that its provisions were conditioned on his wife's waiving her right to take one-half of their California community property. Such a waiver (Ex. 2, Appendix, *infra*) was executed by Walter's wife, Emily, contemporaneously with the execution of the will. The will also gave Emily the power to withdraw one-half of the amount of the corpus of the trust for any purpose she might desire. (R. 37-38.)

As executor, taxpayer administered Walter's estate from January 11, 1939, until August 26, 1941, on which latter date the assets were distributed in accordance with a decree of final distribution, without the taxpayer, however, being discharged as executor.

On May 8, 1941, under the power given her in Walter's will, Emily assigned fifty per cent of the trust property to Crocker First National Bank of San Francisco to hold, as trustee, under a trust created by herself. Under the August 26, 1941, decree of final distribution, this assigned property was distributed by taxpayer to Crocker First National Bank.

Then, on November 24, 1941, Emily Gibson, the surviving spouse, died. (R. 18-19.)

On the 1941 fiduciary income tax return filed on behalf of Walter's estate, taxpayer reported only \$19,690.65, representing one-half of the income attributable to the property subject to its administration, as executor, during the period January 1, 1941, to August 26, 1941, the final distribution date. Meanwhile, the other half of such income received during the taxable period—*viz.*, \$19,690.65—was reported on the last income tax return filed for the decedent's wife for the period from January 1, 1941, to November 24, 1941, the date of Emily's death. During the taxable period January 1, 1941, to August 26, 1941 (the final distribution date), the gross income attributable to the property subject to administration amounted in total to \$39,381.30. (R.19.)

The Commissioner proposed a deficiency assessment of \$9,161.19 against Walter's estate (R. 19-20) on the ground that the entire \$39,381.30 received as income during the period from January 1, 1941, to August 26, 1941, was taxable to the deceased husband. Concurrently, an overassessment was proposed with respect to the tax paid by the estate of the wife. By agreement between the parties the deficiency assessed against the husband's estate was satisfied by setting off against it the overassessment in favor of the estate of the wife and the balance was paid in cash. The wife's estate was reimbursed for the use of this certificate of overassessment. That amount was charged by the husband's estate to his heirs. (R. 38.)

Thereafter, on June 30, 1947, tax payer, as executor for Walter's estate, filed a claim for refund of income taxes in the sum of \$9,161.19 for 1941 on the ground that for the period in question only one-half of the income was chargeable to his estate, the other half being chargeable to the estate of Emily Gibson. On April 12, 1950, the Commissioner allowed this claim but reduced the amount payable by \$7,100.35, the sum of a proposed deficiency in the tax due from the estate of the wife, Emily Gibson. The balance of \$2,060.84, plus interest of \$347.83, was paid to taxpayer on April 12, 1950. On April 13, 1950, the Commissioner notified taxpayer that the claim for refund was disallowed to the extent not previously allowed. The Commissioner thereby disallowed the claim for refund to the extent of \$7,100.35. (R. 23-25, 39-46.)¹

The District Court concluded that the election by the wife, Emily A. Gibson, to waive her community property rights and take according to the will changed the character of the community interest on the death of her husband and the entire community property became the estate of the husband, and accordingly, that the Commissioner properly determined in accordance with law that taxpayer was liable for income

¹The net overassessment allowed Walter's estate was \$2,060.84, together with interest thereon of \$347.83, or a total sum of \$2,407.67. The claim for refund filed by Walter's estate was based on an alleged overassessment of 1941 income tax in the amount of \$9,362.58. The difference between the \$9,362.58 claimed and the \$2,060.84 allowed would thus appear to be \$7,301.74. However, because of minor adjustments correcting an understatement of capital loss and an overstatement of trust income, the agreed amount of the difference was \$7,100.35. (R. 24-25.)

taxes upon the entire income of the estate of Walter D. K. Gibson. (R. 46-47.)² The District Court entered judgment dismissing the complaint. (R. 48-49.)

SUMMARY OF ARGUMENT.

I.

We submit that, under the facts here obtaining, the District Court correctly held that upon Walter's death, Emily's waiver and election agreement, upon which Walter's will was conditioned, operated to change the character of her previously existing community ownership and convert what had been her one-half share into separate estate property, with her interest therein being that of a beneficiary. Moreover, we submit that the District Court was correct in holding that the existence of this waiver and election agreement patently serves to distinguish this case from the situation which was before this Court in *Bishop v. Commissioner*, 152 F.2d 389, and in *United States v. Merrill*, 211 F.2d 297. Taxpayer's attempt to rely on the *Bishop* principle in this case is entirely unwarranted since neither *Bishop* nor *Merrill* presented factual circumstances wherein the spouses had

²During the course of the trial, the Government sought to interpose a counterclaim for recovery of \$2,408.67, the amount of principal and interest paid to taxpayer on April 12, 1950, and which it alleged had erroneously been refunded. (R. 24, 42-43, 46.) The District Court, however, denied the Government's motion for leave to file such a counterclaim (R. 43, 47) and the Government has not appealed.

entered into an agreement to change the character of the surviving wife's previously existing community ownership interest to separate property of the deceased husband's estate, with the wife sharing therein only as a beneficiary under the will.

Ample authority exists in the established decisions of this Court and the California courts, as well as in the pertinent California statutes, to support the correctness of the District Court's decision in this case. Under these decisions, it has long been settled that spouses may agree to transmute their community property to the separate estate of both or either by an agreement which ordinarily need not be executed with any particular formality. Settled also is the proposition that a single written instrument agreed to by both spouses may constitute both a will and a contract. Equally established is the corollary principle that an election by the surviving spouse to take under the will is binding and enforceable as a contract under California law. All of these principles have been accorded recognition by this Court in permitting spouses, under appropriate circumstances, to change the character of property from community to separate and thus alter the nature of the property for federal income tax purposes.

For the reasons stated above, we submit that the District Court was correct in holding that the entire income received during the taxable period of administration prior to final distribution should be taxed to Walter's estate. Neither is there any merit in taxpayer's attempt to argue that one-half of the in-

come of Walter's estate should be taxed to Emily A. Gibson, deceased.

II.

As an alternative argument, we submit that should this Court not agree with the Government's contention in Point I, *supra*, seven-eighths of the judgment will inure to the benefit of Grace Collins and Walter Gibson, Jr., the heirs of Emily Gibson. The rendering of such a judgment will mean that one-half of the income received between January 1, 1941, and August 26, 1941, should have been taxed to the estate of Emily Gibson. Accordingly, equity requires that any judgment in favor of the taxpayer should be reduced by the amount that will go to Emily Gibson's heirs.

The result indicated above follows from the fact that Grace Collins and Walter Gibson, Jr., upon recovery of the tax here in issue, will receive seven-eighths of the refund under the terms of the decree of final distribution, as agreed to by the parties. At the same time, as residuary legatees of the estate of Emily, Grace Collins and Walter Gibson, Jr., as transferees, would owe the tax which would otherwise be assessable as a deficiency against the estate of Emily Gibson, were it not for the bar of the statute of limitations. In such circumstance, we submit that, upon equitable principles, the Government has the right to recoup the amount that will go to the same persons who should bear the burden of the tax on the same income. *Stone v. White*, 301 U.S. 532, rehearing denied, 302 U.S. 639. Therefore, if the

Government retains seven-eighths of the amount of any judgment inuring to the benefit of Grace Collins and Walter Gibson, Jr., the taxpayer-executor will have suffered no burden and the Government will not be unjustly enriched. Neither does the fact that a judgment in favor of the taxpayer might operate to lift the bar against assessment of the tax against the estate of Emily Gibson or its transferees weaken the Government's argument for application of the doctrine of equitable recoupment. The mere fact that another remedy exists is no bar to asserting an equitable remedy which will here, to the extent that recoupment is allowed, avoid circuitry of action. Neither is there any merit in taxpayer's attempt, under these circumstances, to limit the clearly applicable rule of *Stone v. White, supra*, as laid down by the Supreme Court.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY HELD THAT ALL THE INCOME FOR THE PERIOD OF ADMINISTRATION PRIOR TO DISTRIBUTION BETWEEN JANUARY 1, 1941, AND AUGUST 26, 1941, ATTRIBUTABLE TO THE PROPERTY SUBJECT TO ADMINISTRATION IN THE ESTATE OF THE HUSBAND, WALTER D. K. GIBSON, WAS TAXABLE TO HIS ESTATE.

We submit that, with respect to the sole issue here on appeal, the District Court correctly concluded (R. 42):

* * * in the case at bar, the Court finds that Emily Gibson's waiver changed the character

of the community interest upon the death of her husband and that the executor of the Last Will of Walter Gibson was liable for the full amount of taxes assessed against it. * * *

Under the facts here obtaining, the spouses, Walter and Emily Gibson, who were residents of California owning community property, entered into an agreement on August 31, 1937, expressly designed to change the character of the community ownership to separate property of Walter's estate, which could be distributed under his will at his death. This agreement was effected by Walter's expressly conditioning his will upon Emily's contemporaneous execution of a waiver agreement, pursuant to which, in consideration of the provisions made for herself and the children in the husband's will, she waived all right to her one-half community ownership and elected to take under the will. This agreement became operative on December 21, 1938, when Walter died, with his estate being administered by taxpayer-executor until August 26, 1941, the date of final distribution. In addition to its being conditioned on Emily's waiver of her community ownership rights, the will created a testamentary trust composed of all the property, with Emily as income beneficiary for life, and also granted Emily a power to withdraw up to one-half of the trust property for any reason she might wish. In point of fact, Emily, on May 8, 1941, exercised this power by assigning half of the trust corpus to a trust of which she was the settlor. On August 26, 1941, the final distribution date, this property

was distributed by Walter's executor to Emily's trustee. Thereafter, on November 24, 1941, Emily died.

During the final period of administration of Walter's estate prior to distribution—*viz.*, January 1, 1941, to August 26, 1941—income attributable to the estate property was received in the amount of \$39,381.30. In its federal income tax return for the period, Walter's executor returned only \$19,690.65, or one-half of this amount. The remaining \$19,690.65 was reported in Emily's final income tax return for the period January 1, 1941, to November 24, 1941, the date of her death. A deficiency was assessed against taxpayer-executor for failure to include all of the income—*viz.*, \$39,381.30. The deficiency was paid by offsetting, in part, an overassessment credit of \$7,100.35 due Emily A. Gibson, deceased, on the \$19,690.65 which had been reported on her final return. The instant suit for refund was commenced to recover this \$7,100.35, which was not refunded to Walter's executor in cash.

The correctness of the trial judge's decision is clearly supported by the facts and by the pertinent federal and California court decisions. Neither should any significance be attached to taxpayer's attempt (Br. 10-21) to apply the now settled rule of *Bishop v. Commissioner*, 152 F.2d 389 (C.A. 9th), to this clearly distinguishable set of facts. As the District Judge pointed out (R. 39-42) below, this is clearly *not* a case to which the holding in the *Bishop* case applies.

Here, the deceased husband's will (R. 18; Ex. 1, Appendix, *infra*) was expressly conditioned on Emily Gibson's contemporaneously executed waiver (R. 18; Ex. 2, Appendix, *infra*) of all "right to claim one-half ($1\frac{1}{2}$) or any part of the community property" upon her husband's death. Under the waiver, "in consideration of its [viz., the will's] provisions therein contained for my benefit and for the benefit of others therein mentioned," Emily agreed to the terms of the will, which, in turn, expressly obligated her to "elect to accept the provisions of this my Last Will and Testament made herein for her benefit." Accordingly, since Walter D. K. Gibson predeceased Emily, dying on December 21, 1938 (R. 17), the *entire* amount of the community property (which was the subject of the spouses' express agreement incorporated in Walter's will and Emily's waiver and election) became subject to administration in taxpayer-executor's hands under the terms of Walter's will. In other words, as the District Court correctly pointed out (R. 42), the result achieved by the agreement of August 31, 1937—*vis.*, the execution by the spouses of the will and the waiver (R. 45)—was the conversion of the community property, at Walter's death, into separate property subject to administration in Walter's estate. Under the express terms of the waiver, moreover, as the District Court observed (R. 40), Emily elected to share in Walter's estate *as a beneficiary*, deriving all subsequent interest in the property through such relationship. Accordingly, as between Emily and taxpayer-executor, consistent with her express agreement to assume contractually

the role of beneficiary, no *ownership*³ obligation fell upon the surviving spouse to pay any federal tax on the estate's *income*⁴ during the period of administration until a *distribution* was made, which here took place on August 26, 1941. (R. 17-18.)

Ample support for the proposition developed above can be found in the decisions of the California courts and the pertinent state statutes dealing with community property. It has long been settled, since the

³See *Bishop v. Commissioner, supra*, where this Court laid down the "ownership" test, as follows (p. 390):

Being the owner of a one-half interest in the community property, petitioner owned one-half of the income therefrom. Since ownership is the test of taxability, petitioner's half of the \$4,563.40 was taxable to her, not to the estate.

⁴Emphasis is here warranted on the fact that the tax involved is federal tax on income attributable to property administered by the taxpayer (as executor of Walter's estate) during the predistribution period from January 1, 1941, to August 26, 1941, in contrast to a federal *estate* tax arising on the *transfer* of property at Walter's death—*viz.*, December 21, 1938. (R. 17.) In this connection, Walter and Emily's agreement, incorporated in the will and the waiver executed on August 31, 1937 (R. 18), provided for the actual *transfer* of the property to taxpayer-executor which here took place upon Walter's death, with federal *estate* tax consequences which are not here in issue. Accordingly, as the District Court pointed out (R. 40-41), *Pacific National Bank of Seattle v. Commissioner*, 40 B.T.A. 128 (Acquiescence, 1939-2 Cum. Bull. 28), and *Coffman-Dobson Bank & Trust Co. v. Commissioner*, 20 B.T.A. 890 (Acquiescence, X-1 Cum. Bull. 13 (1931), both of which are mistakenly relied on by the taxpayer, are not in point since both of these decisions involve principles of estate tax rather than income tax and hold that community property, though administered by the estate of the first spouse to die, is subject to an estate tax only on the one-half properly attributable to the decedent. In contrast to the issue here presented, they do not rule that unit created by the will of the decedent under a valid election of one of the spouses, may be considered thereafter as a community interest divisible for income tax purposes during the period of probate administration.

decision in *Marlow v. Barlew*, 53 Cal. 456, 459, that the spouses may agree with respect to the character of the property which they hold to transmute such property from community to the separate estate of both or either by an agreement which ordinarily need not be executed with any particular formality. *Kenney v. Kenney*, 220 Cal. 134, 30 P.2d 398; *Rothschild v. Davis*, 217 Cal. 660, 20 P.2d 329; *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003; *Estate of Kelpsch*, 203 Cal. 613, 265 Pac. 214; *Title Insurance Etc. Co. v. Ingersoll*, 153 Cal. 1, 94 Pac. 94; *Collins v. Sword*, 4 Cal. App.2d 437, 41 P.2d 170; *McCall v. McCall*, 2 Cal. App.2d 92, 37 P.2d 496; *Young v. Young*, 126 Cal. App. 306, 14 P.2d 580; *Estate of Sill*, 121 Cal. App. 202, 9 P.2d 243; *Estate of Wyss*, 112 Cal. App. 487, 297 Pac. 100; *Estate of Wahlefeld*, 105 Cal. App. 770, 288 Pac. 870; *Vieux v. Vieux*, 80 Cal. App. 222, 251 Pac. 640; *Martin v. Pritchard*, 52 Cal. App. 720, 199 Pac. 846, and Deering's Civil Code of California (1931), Sec. 158. Equally well established is the proposition that a single written instrument agreed to by both spouses may constitute both a will and a contract. *Estate of Watkins*, 16 Cal.2d 793, 108 P.2d 417; *Security-First Nat. Bank v. Stack*, 32 Cal. App.2d 586, 90 P.2d 337; and *Norton v. Estate of Norton*, 41 Cal. App. 614, 183 Pac. 214. As the trial court pointed out (R. 40), the corollary proposition is equally well settled that an election by the surviving spouse to take under the will is binding and enforceable as a contract under California law. *Estate of Watkins*, *supra*; *Flanagan v. Capital Nat. Bank*,

213 Cal. 664, 3 P.2d 307, and *Security-First Nat. Bank v. Stack*, *supra*.

Applying the above principles of California community property law, this Court has frequently had occasion to recognize that Sections 158 and 159 of the Civil Code of California permit the spouses, by their contract, to change the character of property from community to separate and thus alter the nature of the property for federal *income* tax purposes. *O'Bryan v. Commissioner*, 148 F.2d 456, 458; *Van Dyke v. Commissioner*, 120 F.2d 945, 947; *Boland v. Commissioner*, 118 F.2d 622, 624; *Sparkman v. Commissioner*, 112 F.2d 774, 776-777, and *Helvering v. Hickman*, 70 F.2d 985, 987-988.

At the trial below, the District Court, we submit correctly, applied the well-established principles expounded in the above-cited state and federal decisions to hold (R. 42) that, upon Walter's death, the waiver and election executed by Emily Gibson operated to change the character of her prewaiver interest in the community property, with the result that (R. 40) her previously existing community interest was converted into separate estate property, with her interest in Walter's estate being that of a beneficiary. As the trial judge pointed out (R. 39-40), such a conclusion is in no way inconsistent with the result reached in *Bishop v. Commissioner*, *supra*, since the *Bishop* case is clearly distinguishable on its facts in that no waiver and election agreement were there entered into between the spouses to change the character of the surviving wife's previously existing com-

munity property ownership interest.⁵ Accordingly, the rationale of the *Bishop* case has no valid applicability to the facts of this case and the taxpayer's reliance thereon (Br. 10-13) is completely unwarranted. Equally ineffective is taxpayer's argument (Br. 13-15) that the waiver contract lacked mutuality of obligation because, in electing to take under the will, Emily was granted a power to withdraw one-half of the corpus of the Emily A. Gibson trust estate, created thereunder for her life benefit. Clearly, the grant of this power of invasion *under the will* in no respect vitiates the validity of the waiver contract itself, which was entered into on August 31, 1937, "in consideration of its [*viz.*, the will's] provisions therein contained for my benefit and for the benefit of others therein mentioned." The requisite mutuality of obligation was thus created on execution of the waiver contract. As of that date, Emily, for adequate consideration, agreed to the conversion of her previously existing community ownership interest to separate property of Walter's estate at the time of his death. Accordingly, the coincidence that the community ownership which would have then existed but for the waiver contract amounted to one-half, whereas the power of invasion, upon exercise by Emily as life beneficiary, could reach one-half of the testamentary Emily A. Gibson trust corpus, can not serve to indicate a lack of enforceability of the waiver contract, as taxpayer attempts (B. 14) to

⁵See also *United States v. Merrill*, 211 F. 2d 297 (C.A. 9th), which is likewise clearly distinguishable from the instant case for the same reason.

claim. On the contrary, taxpayer's reliance on the testamentary trust and the power of invasion, purportedly (Br. 14) to demonstrate Emily's ability to "withdraw her consideration," evidences, realistically, the *validity* of the *waiver contract*. This follows from the fact that both the trust and the power were created under Walter's will, which, in turn, was conditioned on the validity of the waiver contract.

Again, it is of no avail to taxpayer to attempt to argue (Br. 15-21) that the grant, under the will, of the power of invasion was, in effect, a power of revocation, within the meaning of Section 166 of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 166). As has been pointed out above and as the trial court held, under both the established California decisions and those of this Court, the waiver contract operated to convert Emily's previously existing community ownership to separate property of Walter's estate, subject to the provisions of his will. Under the will, Walter, and *not* Emily, was the *grantor* of the testamentary Emily A. Gibson trust. Accordingly, it becomes impossible to claim that there could be a power of revocation in Emily, since her relationship to the trust was that of a *beneficiary* and *not* that of a *grantor*. Under no circumstance could an exercise of the power of invasion operate to re-vest title to any part of the trust corpus in the decedent grantor. Moreover, as we pointed out above (fn. 3, *supra*), the *Pacific National Bank of Seattle* and *Coffman-Dobson Bank & Trust Co.* cases, *supra*, here relied on by taxpayer (Br. 18-19), are concerned

solely with the issue of includibility in Walter's gross estate for federal *estate* tax purposes and have no applicability to the federal *income* tax issue here before the Court.

II.

SHOULD THIS COURT GRANT JUDGMENT IN FAVOR OF THE TAXPAYER, SEVEN-EIGHTHS OF THE JUDGMENT WILL INURE TO THE BENEFIT OF THE HEIRS OF EMILY GIBSON. THE RENDERING OF JUDGMENT WILL MEAN THAT ONE-HALF OF THE INCOME SHOULD HAVE BEEN TAXED TO THE ESTATE OF EMILY GIBSON. EQUITY REQUIRES THAT ANY JUDGMENT IN FAVOR OF THE TAXPAYER BE REDUCED BY THE AMOUNT THAT WILL GO TO THE HEIRS OF EMILY GIBSON.

The Government reiterates its contention (Point I, *supra*) that the income in question is properly taxable in its entirety to the estate of Walter Gibson. However, should the Court not affirm the District Court on this ground, an alternative defense is here available. In substance, this defense is that the Government has a paramount right to the monies sought, at least to the extent that a judgment will inure to the benefit of the heirs of Emily Gibson. This defense was expressly raised in the answer (R. 16) but the District Court (R. 42) found it unnecessary to rule upon it.

An action brought to recover taxes erroneously paid is predicated on the same equitable principles that underlie an action *in assumpsit* for money had and received. *United States v. Jefferson Electric Co.*, 291 U.S. 386. Recovery can be had only by virtue

of a right measured by equitable standards. It is therefore open to the Government to show any state of facts which, according to these standards, would deny the right. *Stone v. White*, 301 U.S. 532, rehearing denied, 302 U.S. 639; *Lewis v. Reynolds*, 284 U.S. 281. It is true that the Government cannot resurrect barred deficiencies for other years and claim recoupment based on them. *McEachern v. Rose*, 302 U.S. 56. It can, however, show offsetting items for the same year which cannot at the time of suit be assessed because of the statute of limitations.

Should the Court render judgment in favor of the taxpayer, it will in effect be deciding that one-half of the income in question was taxable to the estate of Emily Gibson. Assessment of a deficiency against that estate is at this time barred. However, the tax which should have been paid, if that is the decision of the Court, was a tax on the same income with respect to which the taxpayer claims an overpayment. In *Stone v. White*, *supra*, the Supreme Court held that where an overpayment by a trust would, if recovered, go directly to the beneficiary who should have paid the tax, the amount of tax owed by the beneficiary could properly be asserted by way of recoupment. Our primary question here is, therefore, who were the beneficiaries of Walter Gibson's estate, and who were the beneficiaries of Emily Gibson's estate?

If recovery is had by the taxpayer, the money will be distributed one-half to the Crocker First National Bank of San Francisco under the trust created by

Emily Gibson, one-eighth outright to Walter Gibson, Jr., one-eighth in trust to Joanne Gibson and one-fourth in trust to Grace Collins. (R. 22-23.) The residuary legatees of the estate of Emily Gibson were Walter Gibson, Jr., and Grace Collins. (R. 23.) Walter Gibson, Jr., and Grace Collins are, therefore, the persons who would owe the tax as transferees of the estate of Emily Gibson. However, with the exception of the one-eighth which would go to Joanne Gibson, they are the very persons who would benefit under any judgment in this case. The one-half of the judgment which would go to the Crocker First National Bank would be for the beneficiaries of two trusts, the beneficiary of one being Grace Collins (R. 34, 36) and the beneficiary of the other being Walter Gibson, Jr. (R. 34-35.) Each is given a testamentary power of appointment over the corpus. (R. 34-35.) The trustee is authorized to invade the corpus of each estate to the extent of \$5,000 a year, should that be necessary for the proper support and maintenance of the beneficiary. (R. 34-35.) Each beneficiary is given the power upon reaching the age of 55 to invade the corpus to the extent of \$10,000 per year, this power being cumulative. (R. 34-35.) Grace Collins reached the age of 55 in 1949 (R. 34), and Walter Gibson, Jr., will reach the age of 55 in 1958. (R. 35.) We believe that the mere presence of the testamentary power of appointment is sufficient to show an identity between these two trusts and the beneficiaries. The wide powers of invasion given both to the trustee and the beneficiaries serve only to strengthen this identity. With respect to the one-

eighth of the judgment which would be paid to Walter Gibson, Jr., there is of course no problem since this would be paid outright. (R. 35.)

With respect to the one-fourth which would be paid in trust to Grace Collins, practically the same situation exists as that with respect to the two trusts previously mentioned. While no testamentary power of appointment was given to Grace Collins, the corpus will, if she becomes a widow, be paid over to her free of trust. In addition, she has the power to invade the corpus to the extent of \$5,000 per year. There is no age limitation on this power and the power is cumulative. (R. 36.)

We believe that to the extent of seven-eighths of any judgment which would be entered in this case, the residuary legatees of Emily Gibson's estate would benefit directly. The principles enunciated in *Stone v. White*, 301 U.S. 532, rehearing denied, 302 U.S. 639, therefore apply, and the Government's right to seven-eighths of the amount sought is equal or paramount to that of the taxpayer.

We wish to point out that the Government is not here contending that the taxpayer is estopped from bringing this action as it did in *United States v. S. F. Scott & Sons*, 69 F.2d 728 (C.A. 1st), cited by the taxpayer. (Br. 30.) In fact, it concedes that should judgment be entered, the taxpayer's right to one-eighth of the amount is paramount. What it does contend is that upon equitable principles it has a right to recoup the amount that will go to those who should bear the burden of the tax on this very same income.

Stone v. White, supra. We do not read *McEachern v. Rose*, 302 U.S. 56, relied on by taxpayer (Br. 24), as overruling or limiting the principles laid down in *Stone v. White*. In fact, the Court in that case expressly approved its prior statement. In speaking of *Stone v. White*, it said (p. 63):

Equitable considerations not within the reach of the statutes denied a recovery. It was enough, in the peculiar facts of the case, that the trustees had suffered no burden and that the Government was not unjustly enriched.

We submit that should judgment be entered in favor of the taxpayer, that is exactly the situation that will prevail. If the Government retains seven-eighths of the amount, the taxpayer will have suffered no burden and the Government will not be unjustly enriched. In attempting to escape the effect of the *Stone v. White* ruling, the taxpayer relies heavily on *Benfield v. United States*, 27 F. Supp. 56 (C.Cls.), *McNaghten v. United States*, 17 F. Supp. 509 (C.Cls.), and *Sewell v. United States*, 19 F. Supp. 657 (C.Cls.). (Br. 27-28, 28-29, 32-33, 35.) The *Sewell* case is distinguishable in that there was a complete lack of identity between the beneficiary who should have paid the tax and the remainderman who sought to recover an overpayment. The court also held in the *Benfield* case that there was a lack of substantial identity between the parties seeking to recover and the parties on whom the tax should have fallen. The Court of Claims indicates, however, in both the *McNaghten* and *Benfield* cases that in order to recoup the tax

that should have been paid the Commissioner must have mistakenly relied on some court decision which was later overruled. While this was actually the fact in *Stone v. White*, *supra*, we do not read the Supreme Court's opinion as being based upon it, but rather as being based upon the equitable considerations present. It is significant that in the *Benfield* case the Court of Claims states that recent cases have placed a limitation upon the rule laid down in *Stone v. White*. In support of this, however, it cites only its own prior decisions in *McNaghten* and *Sewell*.

It is true that should the Court render judgment in favor of the taxpayer in this case, that judgment will operate to lift the bar against assessment of the tax against the estate of Emily Gibson or its transferees in accordance with Sections 1311 through 1315 of the Internal Revenue Code of 1954. (26 U.S.C. 1952 ed., Supp. II, Secs. 1311-1315.) However, a sound, equitable basis exists for recognizing and allowing recoupment to the extent of their interest in any judgment here. The mere fact that another remedy exists is no bar to asserting an equitable remedy in this action. To the extent that recoupment is allowed, it will of course avoid circuitry of action.

CONCLUSION.

For the reasons given above, the judgment of the District Court should be affirmed.

Respectfully, submitted,

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July, 1956.

(Appendix Follows.)



Appendix.



Appendix.⁶

EXHIBIT 1.

I, Walter D. K. Gibson, of the City and County of San Francisco, State of California, being of sound and disposing mind and memory, do make, publish and declare this to be my Last Will and Testament, in manner following, that is to say:

First: I hereby revoke all former wills and testamentary dispositions heretofore made by me.

Second: I hereby declare that all my property and estate, of every kind and description and wherever situate, are the community property of myself and my wife, Emily A. Gibson; and that it is my understanding that, under the laws of the State of California, my said wife may elect to take one-half ($\frac{1}{2}$) of all my property and estate absolutely as her own, free and clear of the provisions of this my Last Will and Testament; or that, at her election, she may waive such right and elect to accept the provisions of this my Last Will and Testament. The provisions of this my Last Will and Testament are made and are conditioned upon the assumption that my said wife will in fact waive her right to take one-half ($\frac{1}{2}$) or any part of my property and estate absolutely as her own, and that she will elect to accept the provisions of this my Last Will and Testament made herein for her benefit.

* * * * *

⁶Pertinent portions of Exhibit 1 and Exhibit 2 are printed in accordance with the terms of the "Supplement To Designation of Record For Printing," filed with this Court on or about March 12, 1956.

Fifth: In the event that my said wife shall survive me, all the rest, residue and remainder of my estate I give, devise and bequeath to Wells Fargo Bank & Union Trust Co. (of San Francisco), in trust, nevertheless, to and for the uses and purposes and upon the terms and conditions following:

* * * * *

(3) The Trustee shall set aside all the rest of the trust estate * * * which said trust estate shall be known as the Emily A. Gibson Trust Estate. The Trustee shall pay the net income therefrom to my said wife during her lifetime. My said wife shall also be entitled to withdraw such portions of the corpus of said Emily A. Gibson Trust Estate (not exceeding, however, in all one-half ($\frac{1}{2}$) of the amount of the corpus thereof) from time to time and for any purpose as she may desire.

* * * * *

EXHIBIT 2.

I, Emily A. Gibson, the wife of Walter D. K. Gibson, hereby state that I have read the foregoing Last Will and Testament of my husband dated August 31, 1937, and in consideration of its provisions therein contained for my benefit and for the benefit of others therein mentioned, I agree to accept the terms thereof, and I hereby waive my right to claim one-half ($\frac{1}{2}$) or any part of the community property of myself and husband upon his death prior to my decease.

Dated: August 31, 1937.

EMILY A. GIBSON.

No. 15,046

United States Court of Appeals
For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST Co.,
Executer of the Will of Walter D. K.
Gibson, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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United States Court of Appeals For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST Co.,
Executor of the Will of Walter D. K.
Gibson, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

ONLY ONE-HALF THE INCOME IS TAXABLE TO WALTER'S ESTATE UNDER THE DECISION IN BISHOP v. COMMISSIONER.

Although appellant reaffirms its contention that the lack of mutuality of obligation prevents the waiver executed by decedent's wife from being a binding contract (App. Br. 13-15), nevertheless appellant submits that, even if the Court should hold the waiver to be a contract binding upon decedent's wife, appellant is still entitled to prevail in this action for the following reasons.

Appellee argues that upon decedent's death the waiver and the will, taken together, constitute a binding contract

upon decedent's wife (see Gov't. Br. 14, 15, and *Estate of Whitney*, 171 Cal. 750, 154 Pac. 855 (1916), cited App. Br. 13). Appellee also argues, however, that the result of this contract is that decedent's wife took merely as a beneficiary under decedent's will. It is apparent that the contract must be enforceable in favor of the wife as well as against her, and that she therefore received her benefits under the will by reason of the contract and not as a gratuitous beneficiary. Under the terms of that contract decedent's wife had the right to withdraw one-half the estate. This is the same right she would have had if she had retained her community property interest. Of course, she could only receive actual possession of the property upon a partial or final distribution of the estate, but a wife can only receive physical possession of her share of the community property upon a partial or final distribution of the estate. (Section 202, California Probate Code, discussed Appellant's Brief, 10-13.)

Thus the contract right of decedent's wife to withdraw half the estate and the legal right of a surviving widow to one-half the community property are identical and should receive the same treatment under the Internal Revenue Code for income tax purposes.

Appellee apparently misconceives appellant's position in regard to *Pacific National Bank of Seattle, Executor*, 40 B.T.A. 128 (1939), acq. 1939-2 C.B. 28, and *Coffman-Dobson Bank & Trust Co.*, 20 B.T.A. 890 (1930), acq. X-1 C.B. 13 (1931) (Gov't. Br. 14, footnote 4). Appellant recognizes that those cases deal with the federal estate tax and not with the federal income tax, but that is not important here. What is important is the discussion in the

cases in regard to the community property law governing the effect of the wife's waiver of her community property rights. In both cases the deceased husband had created a testamentary trust. The cases conclude that under the community property law the wife's waiver is to be construed as if she contributed her one-half of the community property which she owned at the date of the husband's death to the testamentary trust created by the husband. That is, the wife is in effect a grantor as to one-half the property in the testamentary trust. That general legal analysis of the effect of the wife's waiver of her community property interest is as valid for the application of the federal income tax as it is for the application of the federal estate tax. Thus under the analysis of these cases the wife is the grantor of one-half the property included in the testamentary trust created by the husband's will. If she has the right to withdraw one-half of that property, the applicability of section 166 of the Internal Revenue Code of 1939 is easily seen (see discussion App. Br. 15-21).

It should be noted that under section 166 (quoted App. Br. 17) income of the trust is taxable to the grantor, "Where *at any time* the power to revest title * * * is in the grantor." (Italics supplied.) The Commissioner interpreted section 166 to mean that the income of the trust is taxable to the grantor, "If the title to the corpus will revert in the grantor upon the exercise of such power * * * regardless of—

* * *

"(iii) The time at which the title to the corpus will revert in the grantor in possession and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain

to come.” (U.S. Treas. Reg. 118, section 39.166-1(b).)

Thus the fact that decedent’s wife would have to wait a few months until distribution of the estate would not prevent one-half of the income from the estate from being taxed to her under section 166. Of course, under *Bishop v. Commissioner*, 152 F.2d 389 (9th Cir., 1945), the fact that the wife has to wait until her share of the community property is distributed to her does not prevent one-half of the income from the property subject to administration in the husband’s estate from being taxed to the wife.

Appellee cites sections 158 and 159 of the California Civil Code under which the spouses may by contract change the character of their property from community to separate, and cases from this Court holding that such a change must be recognized for federal income tax purposes:

O’Bryan v. Commissioner, 148 F.2d 456 (9th Cir., 1945);

Van Dyke v. Commissioner, 120 F.2d 945 (9th Cir., 1941);

Boland v. Commissioner, 118 F.2d 622 (9th Cir., 1941);

Sparkman v. Commissioner, 112 F.2d 774 (9th Cir., 1940);

Helvering v. Hickman, 70 F.2d 985 (9th Cir., 1934).

These basic rules of law are, of course, well recognized if we grant that a binding contract was made. Assuming that a binding contract was made, it is necessary to carry these basic rules one step farther in order to decide the case at bar. In the cited cases the Court carefully con-

strued the agreements between the parties in order to determine the nature of the parties' rights. In none of those cases did the agreement involve a transfer of a community interest with a right to withdraw the value of the property transferred.

Appellant submits that if the Court holds that the waiver and will constitute a binding contract, the power of decedent's wife under that agreement to withdraw one-half of the estate requires that one-half of the income received by the estate be taxed to decedent's wife. The wife's power of control is the big factor in this case, as this Court in the *Bishop* case held. Even if the power to withdraw one-half of this testamentary trust did not originate in the decedent's wife by contract, that is, even if it was donated by decedent to her, still the Commissioner has argued and the courts have held that a person holding such a donated power is taxable on the income from trust property over which the person has such power. *Emery v. Commissioner*, 156 F.2d 728 (1st Cir., 1946), cert. den. 329 U.S. 772 (1946); *Mallinckrodt v. Numan*, 146 F.2d 1 (8th Cir., 1945), cert. den. 324 U.S. 871 (1945). If a person with a donated power is subject to tax, certainly decedent's wife, with a contract right to withdraw one-half of the testamentary trust, is subject to tax.

II.

THE DEFENSE OF EQUITABLE RECOUPMENT.

Appellant in its opening brief demonstrated: (1) that the doctrine of equitable recoupment has a narrow scope; (2) that the Commissioner's laches prevents the applica-

tion of the doctrine in this case; (3) that the lack of identity of the parties prevents the application of the doctrine in this case; and (4) that Internal Revenue Code procedures supersede the doctrine. Appellant desires to make a few comments under each of these headings in reply to appellee's brief.

A. The Narrow Scope of the Doctrine of Equitable Recoupment.

Appellee states that it does not "read *McEachern v. Rose*, 302 U.S. 56, relied on by taxpayer (Br. 24), as overruling or limiting the principles laid down in *Stone v. White*" (Gov't. Br. 23). As appellant pointed out in its opening brief, however, the Supreme Court in *McEachern v. Rose*, *supra*, *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946), and *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), has severely limited the doctrine of equitable recoupment (App. Br. 24, 25). In commenting on the cases of *Bull v. United States*, 295 U.S. 247 (1935) and *Stone v. White*, 301 U.S. 532 (1937) (discussed App. Br. 22-24), the Supreme Court in *Rothensies v. Electric Storage Battery Co.*, *supra*, stated:

"The application of this general principle to concrete cases in both of the cited decisions is instructive as to the limited scope given to recoupment in tax litigation. * * * Whatever may have been said indicating a broader scope to the doctrine of recoupment, these facts are the only ones in which it has been applied by this court in tax cases." (329 U.S. 296 at pp. 299, 300).

Appellant has quoted the statement of Judge Frank of the Second Circuit in regard to the limiting effect of the later Supreme Court cases in *Wood v. United States*, 213 F.2d 660 (1954) (App. Br. 25). Appellant has not argued

that the later Supreme Court cases overruled *Stone v. White, supra*, but only that the later cases had limited the application of the doctrine of equitable recoupment to the peculiar facts in that case. Appellant submits that the cases amply support its position.

B. The Commissioner's Laches Prevents Application of the Doctrine.

Appellee's brief does not discuss the issue of the Commissioner's laches as a factor in preventing the application of the doctrine of equitable recoupment. Appellant submits, however, that the Commissioner's failure to act in a timely fashion to collect the erroneous refund paid to Emily A. Gibson, deceased, forecloses appellee's reliance upon the equitable recoupment doctrine. As pointed out on pages 26 and 27 of appellant's opening brief, Emily A. Gibson, deceased, received a tax refund on July 11, 1945. Under section 3746(b), Internal Revenue Code of 1939, the Commissioner had two years, or until July 11, 1947, within which to collect this erroneous refund. The *Bishop* case was decided on December 10, 1945. No application for certiorari was made by the Commissioner, and therefore it represents a final decision. The Commissioner had approximately eighteen months after the *Bishop* decision to collect the erroneous refund paid to Emily A. Gibson, deceased. However, he failed to take any steps to collect the refund or to protect himself against the bar of the statute of limitations.

It must be recalled that on June 30, 1947, Walter's Estate filed a claim for refund of the additional tax paid because of the Commissioner's inclusion in Walter's Estate of one-half of the income for the period from Jan-

uary 1, 1941, to August 26, 1941, originally reported by Emily A. Gibson, deceased (R. 9, 10, 23, Stip., par. 13). On April 8, 1948, the Internal Revenue Agent in Charge at San Francisco advised Walter's Estate of a report by a representative of that office recommending that the overassessment be allowed (R. 23, Stip., par. 14). That report recommended that the overassessment be allowed on the basis of *Bishop v. Commissioner, supra* (Stip., Ex. 7, page 5). Walter's Estate received a certificate of overassessment on April 12, 1950, certifying that its income tax for 1941 had been overassessed by \$9,362.58. This certificate was also based upon the *Bishop* case. However, the overassessment was reduced by the sum of \$7,100.35, the amount of the proposed deficiency in tax due from Emily A. Gibson, deceased (R. 24, par. 15).

Thus the Commissioner had taken the position that the *Bishop* case applied to the present proceeding and that Walter's Estate was entitled to a refund, but that because the statute of limitations had run against Emily A. Gibson, deceased, the Commissioner was entitled to withhold the deficiency due from her or her transferees.

Appellant respectfully submits that the whole problem in this case arises because the Commissioner failed to act in a timely fashion to collect the refund erroneously paid to Emily A. Gibson, deceased, or to protect the Government against the bar of the statute of limitations within the eighteen-month period available to him after the decision in the *Bishop* case. Instead of acting in a timely fashion the Commissioner asserted a right to recoup money due from Emily A. Gibson, deceased, by withholding it from a refund legally due Walter's Estate.

The Court of Claims has refused to allow the Government to assert the doctrine of equitable recoupment in cases where the Commissioner has not acted equitably, that is, has failed to assert his rights in a timely fashion.

McNaghten v. United States, 17 F. Supp. 509 (Ct. Cl., 1937);

Benfield v. United States, 27 F. Supp. 56 (Ct. Cl., 1939).

The Government did not seek certiorari to the Supreme Court in either of these cases.

See also *Wood v. United States*, *supra*;

United States v. S. F. Scott & Sons, Inc., 69 F.2d 728 (1st Cir., 1934).

The preceding cases are discussed in appellant's opening brief, pages 26-30.

Appellant submits that the Government cannot now rely on an equitable doctrine to overcome the bar of the statute of limitations when it has failed to act in an equitable manner to protect its rights before those rights were terminated by the statute of limitations.¹

C. Lack of Identity of the Parties Prevents Application of the Doctrine.

It is clear from the cases that, unless there is a clear identity of the parties as between those who will receive the refund and those who are liable for the deficiency, the doctrine of equitable recoupment will not apply. The cases have not applied the doctrine of equitable recoupment

¹As noted, however, in subheading "D", *infra*, the Internal Revenue Code provides a procedure for appellee to assert its rights against Emily A. Gibson, deceased, if judgment is awarded to appellant in the case at bar.

where the parties who are liable for the deficiency would not directly participate in the receipt of the refund (see cases discussed App. Br. 30-36).

In the present case one-half of a judgment in favor of appellant would go to the trust administered by the Crocker First National Bank of San Francisco (now the Crocker-Anglo National Bank) under the trust created by decedent's wife in which Grace Collins and Walter D. K. Gibson, Jr. are the life income beneficiaries; one-fourth would go to the Wells Fargo Bank as trustee of the trust created in decedent's will, Grace Collins being the life income beneficiary; one-eighth would go outright to Walter D. K. Gibson, Jr.; and one-eighth would go in trust to Joanne Gibson (R. 33, Supplemental Stip. par. 2).

Walter D. K. Gibson, Jr. and Grace Collins are equal residuary legatees of Emily's Estate, but they are not the only beneficiaries of Emily's Estate (R. 26, Stip., par. 20).

Appellee assumes that Walter D. K. Gibson, Jr. and Grace Collins are the only beneficiaries of Emily's Estate and, therefore, that they alone would be liable as transferees of her estate for any deficiency in tax owing by Emily A. Gibson, deceased. (Gov't. Br. 20, 21.) But there is another beneficiary or beneficiaries of Emily's Estate who would also be liable as a transferee or transferees. Under paragraph 20 of the stipulation of facts (R. 26) Emily's Estate had total assets of \$75,076.26 and total disbursements other than the payment of legacies of \$52,141.26.² The difference between \$75,076.26 and

²Due to an error in the stipulation of facts total disbursements other than the payment of legacies is stated to be \$39,141.14. That figure should read \$52,141.26.

\$52,141.26 is \$22,935.00. Walter D. K. Gibson, Jr. and Grace Collins each received cash and assets valued at \$9,717.50, or a total of \$19,435.00. The difference between \$22,935.00 and \$19,435.00 is \$3,500.00. Thus some other beneficiary or beneficiaries received a bequest or bequests from Emily's Estate totalling \$3,500.00.

Therefore, there is a beneficiary or beneficiaries in addition to Walter D. K. Gibson, Jr. and Grace Collins who would be liable as a transferee or transferees. Under section 311(a) of the Internal Revenue Code of 1939 the liability of a transferee of property from a taxpayer is stated to be:

“(1) Transferees.—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed on the taxpayer by this chapter.”

The term “transferee” is defined in section 311(f): “As used in this section, the term ‘transferee’ includes heir, legatee, devisee and distributee.” These provisions are carried over in substantially the same form in section 6901, Internal Revenue Code of 1954.

Thus there is no doubt that any legatee or distributee from a decedent's estate qualifies as a “transferee” under the above Code provisions.

See,

Parker v. Commissioner, 122 F.2d 230 (9th Cir., 1941);

Tooley v. Commissioner, 121 F.2d 350 (9th Cir., 1941).

Furthermore the liability of transferees of property from a taxpayer under the above provisions is joint and several to the extent of the property received.

Estate of Robert Lewis Harrison, 16 T.C. 727 (1951).

Appellee has asserted the doctrine of equitable recoupment as an affirmative defense. The burden is therefore on appellee to introduce sufficient evidence to sustain that defense, that is, evidence showing an identity between the parties who would benefit from the judgment prayed for by appellant and who would be liable as transferees for any deficiency in tax owing by Emily A. Gibson, deceased. The facts in this case, however, fail to show such an identity of parties. The transferees from Emily's Estate are shown to be Walter D. K. Gibson, Jr., Grace Collins, and another beneficiary or beneficiaries. On the other hand, only in the case of the one-eighth share which would go directly to Walter D. K. Gibson, Jr., can it be said definitely that any part of a judgment for appellant would go to transferees of Emily's Estate.

In *Stone v. White*, *supra*, the facts showed that by the terms of the trust any recovery of an overassessment by the trustee would be paid directly to the income beneficiary. In the case at bar it is stipulated that if the judgment prayed for by appellant is granted the recovery will be paid to the trusts involved, not the income beneficiaries, Walter D. K. Gibson, Jr., and Grace Collins. Thus, on this ground alone *Stone v. White* is clearly distinguishable from the present case.

Appellee attempts to show, however, that Walter D. K. Gibson, Jr., and Grace Collins will receive the corpus of

the trusts by reciting certain powers of invasion of the corpus and certain special powers of appointment.

Under the trust created by Emily A. Gibson the trustee has the power in its sole discretion to pay amounts from the corpus necessary for the care, maintenance and support of the income beneficiary if in the trustee's opinion the income is insufficient for the proper support, maintenance and care of the beneficiary. Such amounts may not exceed \$5,000 per year (R. 33-35). Grace Collins has had a right since reaching the age of fifty-five (June 16, 1949) to withdraw \$10,000 a year from the corpus, which right is cumulative. Walter D. K. Gibson, Jr., will have that right when he reaches the age of fifty-five on June 16, 1958.

Under the trust created by decedent in which the Wells Fargo Bank is trustee, Grace Collins has the power to invade corpus to the amount of \$5,000 per year, which right is cumulative. Also, Grace Collins will receive the corpus if she should become a widow.

Appellee has not adduced any evidence to show that the corpus of either of these trusts has ever been invaded, or that the corpus is likely to be invaded in the future. Nor has the appellee introduced any evidence to show the actuarial value of the powers of withdrawal held by the income beneficiaries. The Government has the burden of proof on this equitable defense, but it has adduced no evidence to show that these income beneficiaries will ever receive any part of the corpus of these trusts.

The Government points to the fact that under the trust created by Emily A. Gibson, the income beneficiaries have special testamentary powers to appoint the corpus. How-

ever, these special powers merely give the income beneficiaries the right to appoint the corpus to specified members of their families, powers of appointment which Congress has stated are not sufficiently broad to make them taxable under the federal estate tax. (See section 2041, Internal Revenue Code of 1954.) It can hardly be argued that such limited powers are the equivalent of the right to receive the corpus of these trusts.

Furthermore, even if appellee had proved that part of the corpus of these trusts would be received by Walter D. K. Gibson, Jr., and Grace Collins, appellee has not sustained its burden of proving an identity of the parties because it has not shown that the other beneficiary or beneficiaries of Emily's Estate will participate in any judgment for appellant.

Appellee, at page 23 of its brief, comments upon some of the lower court's cases relied upon by appellant to demonstrate the inapplicability of *Stone v. White* to the facts in this case because of the lack of identity of the parties. Appellee notes that in *Benfield v. United States*, *supra*, there was a lack of substantial identity of the parties. Appellant agrees with appellee, but, as appellant pointed out in its opening brief at pages 32 and 33, the facts of the *Benfield* case are very close to those of the present case.

Appellee failed to comment on Judge Learned Hand's opinion in *Schlemmer v. United States*, 94 F.2d 77 (2nd Cir., 1938), discussed in appellant's opening brief, pages 33-35. Appellant submits that this decision is a forceful authority in its favor on the issue of lack of identity of the parties.

Appellee does not believe that *Sewell v. United States*, 19 F.Supp. 657 (Ct.Cl., 1937) is helpful to appellant. Appellant cited the *Sewell* case, however, to emphasize that equitable recoupment will not be applied where the refund will go to the corpus of the trust and will not be directly received by the income beneficiary who would otherwise be liable for the deficiency.

D. Internal Revenue Code Procedures Supersede Equitable Recoupment.

In its brief appellee states:

“It is true that should the Court render judgment in favor of the taxpayer in this case, that judgment will operate to lift the bar against assessment of the tax against the Estate of Emily Gibson or its transferees in accordance with Sections 1311 through 1315 of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Secs. 1311-1315).” (Gov’t. Br. 24.)

Appellee thus admits that the Internal Revenue Code offers a procedure for the proper recovery of the erroneous refund made to Emily A. Gibson, deceased. It is submitted that the Government must follow the well recognized rule in equity that remedies at law must be exhausted before equitable remedies may be pursued. Since the Government has an adequate remedy at law for the recovery of the refund erroneously made to Emily A. Gibson, deceased, it has no equitable right to withhold that refund from appellant. Particularly is this true where appellee is relying on an equitable doctrine which has never been authorized by the Internal Revenue Code and has been severely limited by decisions of the Supreme Court and lower courts.

CONCLUSION.

Appellant respectfully submits that the judgment of the District Court should be reversed and the judgment prayed for in its complaint should be granted.

Dated, San Francisco, California,

July 16, 1956.

Respectfully submitted,

W. T. FITZGERALD,

CLARENCE E. MUSTO,

FRANKLIN C. LATCHAM,

MORRISON, FOERSTER, HOLLOWAY,

SHUMAN & CLARK,

Attorneys for Appellant.

No. 15047

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
MONROE FEED STORE, Respondent.

Transcript of Record

Petition for Enforcement and Petition for Review of Order of the
National Labor Relations Board

FILED

JUN 28 1956

PAUL P. O'BRIEN, CLERK



No. 15047

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NATIONAL LABOR RELATIONS BOARD,
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Petition for Enforcement and Petition for Review of Order of the
National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT 1-D

United States of America

Before the National Labor Relations Board
Nineteenth Region

Case No. 36-CA-434

MONROE FEED STORE

and

AMERICAN FEDERATION OF GRAIN MILLERS,
LOCAL 61, AFL

COMPLAINT

It having been charged by American Federation of Grain Millers, Local 61, affiliated with American Federation of Grain Millers, AFL, that Monroe Feed Store, herein called Respondent, has engaged in, and is now engaging in, certain unfair labor practices affecting commerce as set forth in the Labor Management Relations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director of the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Respondent is now, and has been at all times material herein, a corporation duly organized and

existing under and by virtue of the laws of the state of Oregon, and is now, and has been at all times material herein, continuously engaged in the buying and selling of seed, feed and grain, also the manufacture of poultry and dairy feed in its operations located in Monroe, Oregon, and Corvallis, Oregon, hereinafter referred to as the Oregon operations.

II.

Respondent, in the course and conduct of its business enterprises at its Oregon operations, causes, and has continuously caused, a substantial amount of seed, feed and grain to be purchased and sold, transported and delivered to companies in the state of Oregon, which companies are engaged in interstate commerce.

Respondent sold seed during the past fiscal year valued in excess of \$150,000 to E. F. Burlingham and Sons, a company engaged in interstate commerce. The seed which was sold by Respondent to E. F. Burlingham and Sons was shipped from Respondent's Oregon operations.

III.

Respondent is now, and at all times material herein has been, an employer within the meaning of Section 2, subsection (2) of the Act.

IV.

Respondent is now, and at all times material herein has been, engaged in commerce within the meaning of the Act.

V.

American Federation of Grain Millers, Local 61, affiliated with American Federation of Grain Millers, AFL, hereinafter referred to as the Union, is now, and at all times hereinafter mentioned has been, a labor organization within the meaning of Section 2, subsection (5) of the Act.

VI.

At all times material hereto a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act has been, and is now, as follows:

“All employees employed by Monroe Feed Store exclusive of office and clerical employees as defined by the Act.”

VII.

The Union is now, and since October 27, 1953, has been, the exclusive collective bargaining representative of a majority of Respondent's employees in the unit described in paragraph VI above, and by virtue of Section 9 (a) of the Act has been, and now is, the exclusive representative of all of the employees of Respondent in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

VIII.

Respondent, by its officers, agents, and supervisors, while engaged in the operations described above in paragraphs I, II, III, and IV has, since

on or about October 30, 1953, and continuously down to and including the date of the issuance of this Complaint, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act by:

(a) Urging, persuading, and warning its employees by threats of reprisal or force, or promise of benefits to refrain from assisting, becoming or remaining members of the Union, or engaging or continuing to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; and

(b) By act of a mass termination of its production and maintenance employees, which mass termination took place on October 30, 1953.

IX.

On or about November 2, 1953, and at all times since, while the Respondent was engaged in the operations described in paragraphs I, II, III and IV above, the Respondent refused to bargain with the Union and did deal directly with individual employees on subjects of rates of pay, wages, hours of employment, and other conditions of employment. The demands to bargain were made by the Union to Respondent specifically as follows:

Verbally, to the Respondent's Manager on November 2, 1953, at the Respondent's Office.

By telephone to Respondent's Attorney on November 19, 1953.

By letter to Respondent's Attorney dated November 20, 1953.

The refusal to bargain has continued down through and including the date of the issuance of this Complaint.

X.

Respondent, by all the acts and conducts described in paragraphs VIII and IX above, did interfere with, restrain and coerce its employees and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8, subsection (a) (1) of the Act.

XI.

By refusing to bargain with the Union and by dealing directly with those individual employees on subjects of rates of pay, wages, hours of employment, and other conditions of employment as set forth in paragraph IX above, the Respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8, subsection (a) (5) of the Act.

XII.

The activities of Respondent as set forth and described in paragraphs VIII and IX above, occurring in connection with the operations of Respondent as described in paragraphs I, II, III and IV above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states of the United States and tend to lead

to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIII.

The aforesaid acts of the Respondent, as set forth and described in paragraphs VIII and IX above, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (a) (1) and (5) of the Act, and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board on behalf of the Board, on this first day of February 1954, issues this Complaint against Monroe Feed Store, the Respondent herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.
Regional Director National Labor Relations Board,
Region 19.

Affidavit of Service by Mail and Postal Return
Receipts Attached.

GENERAL COUNSEL'S EXHIBIT 1-F

[Title of Board and Cause.]

ANSWER

By answer to the complaint filed in the above entitled case, Monroe Feed Store alleges as follows:

I.

Denies each and every allegation contained in

paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII thereof and the whole thereof.

Wherefore, Monroe Feed Store prays that the complaint issued herein be dismissed.

MASTERS & MASTERS

/s/ W. MASTERS

of Attorneys for Monroe Feed Store

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 2

United States of America

National Labor Relations Board

PETITION

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

* * * * *

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition (Check only the one box which is appropriate)

* * * * *

B. [x] RM—Representation (Employer.—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9 (a) of the act.

* * * * *

2. Name of Employer: Monroe Feed Store.

Employer Representative to Contact: W. J. Masters. Phone No. At. 6381.

3. Address of Establishment: Monroe, Oregon.

4a. Type of Establishment: Feed and Seed Processor.

4b. Identify Principal Product or Service: Feed, Seed, Grain.

5. Description of Unit Involved: Included: All regular production, maintenance, warehouse and clerical employees. Excluded: Managerial employees.

6a. Number of Employees in Unit: 13.

* * * * *

7a. Request for recognition as Bargaining Representative was made on November 19, 20, Dec. 9, 1953, Feb. 9, 1954, and Employer declined recognition on or about Dec. 7, 1953, Feb. 10, 18, 1954.

* * * * *

8. Recognized or Certified Bargaining Agent: None.

9. Date of Expiration of Current Contract, if any: None.

* * * * *

11. Parties or Organizations Other Than Petitioner Which Have Claimed Recognition as Repre-

sentatives, and Other Unions Interested in the Employees Described in Item 5 above: Local 61, American Fed. of Grain Millers, AF of L, 310 SW Columbia, Portland, Oregon. Date of Claim: Nov. 19, 20, Dec. 9, 1953, Feb. 9, 1954.

* * * * *

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

MONROE FEED STORE,

/s/ By W. R. GIESY, Manager.

Address: Monroe, Ore. Telephone: Corvallis 33415.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Howard A. McIntyre, Esq., for the General Counsel. Paul T. Bailey, Esq., of Portland, Ore., for the Union. Masters & Masters, by William J. Masters, Esq., of Portland, Ore., for the Respondent.

Before: Wallace E. Royster, Trial Examiner.

Statement of the Case

Upon a charge duly filed by American Federation of Grain Millers, Local 61, AFL, herein called the Union, alleging that Monroe Feed Store, herein called the Respondent, has committed violations of the National Labor Relations Act, 61 Stat. 136, herein called the Act, the General Counsel of the

National Labor Relations Board issued a complaint dated February 1, 1954, against the Respondent.

In respect to unfair labor practices the complaint alleges that the Respondent has since November 2, 1953, refused, unlawfully, to bargain with the Union, the majority representative of Respondent's employees in an appropriate unit, and since October 30, 1953, has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act by threats of reprisal or promise of benefits, and by terminating the employment of nearly all workers.

Respondent's answer denies the allegations of the complaint.

Pursuant to notice the hearing was held before the undersigned in Corvallis, Oregon, on March 9 and 10, 1954. All parties were represented by counsel and were permitted to examine and cross-examine witnesses and to introduce evidence pertinent to the issues. Following the close of the hearing briefs have been submitted by counsel for the Union and counsel for the Respondent.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

Monroe Feed Store is a corporation engaged at Monroe and Corvallis in the State of Oregon in buying, processing, and selling feed, grains, fertilizer, and seed. During the 12-month period preceding the hearing, Respondent purchased raw

materials having a value of approximately \$1,000,000. During the same period sales of grains, peas, seed, and feed, and fertilizer exceeded \$1,000,000 in value. Seed accounts for about 15 percent of the dollar volume of sales, and about 90 percent of the seed processed is sold to, and shipped for the account of, E. F. Burlingham & Sons to various points in the United States. About 41 percent of such sales is represented by shipments directly to points outside the State of Oregon. During the past 12 months the value of such shipments to points outside the State of Oregon was between \$55,000 and \$83,000. During the same period Respondent's purchases of fertilizer amounted to approximately \$100,000, all of which originated outside the State of Oregon. The Respondent also makes sales to Kerr Gifford Company and Archer-Daniels Midland Company, both of whom maintain offices in Portland, Oregon, and who resell the same commodities in Oregon as well as in other States.

II. The labor organization involved

American Federation of Grain Millers, Local 61, AFL, is a labor organization admitting to membership employees of the Respondent.

III. The unfair labor practices

Wayne Giesy, one of Respondent's stockholders and directors as well as the manager of its operations in Monroe and Corvallis, has his office in Monroe but throughout the period of interest here

frequently visited for managerial purposes the operation in Corvallis. During 1953 David Crockett was Respondent's assistant manager in charge of the Corvallis operation. On October 28, 1953, Crockett told Giesy, the latter testified, that he had been informed of a union meeting of Respondent's employees at the home of one of them, Webster Sams. Crockett went on to say, according to Giesy, that he had questioned Sams about the matter and had been assured that the meeting did not concern a union. According to Giesy he then dismissed the matter from his mind, assuming and believing that the meeting was no more than a social gathering. At the close of business on October 30 Giesy discharged all of the employees at Monroe except for his father and the bookkeeper. Crockett under Giesy's direction did the same at Corvallis. Giesy told the employees at the time of their dismissal that the action was necessitated by operating losses.

There had been a meeting of employees at the home of Sams on the evening of October 27 and it did concern the Union. At that meeting or the next day 12 of the 13 workers in the two operations signed designations authorizing the Union to represent them. Frank Harrington, one of the employees, testified credibly and without contradiction that on October 30 he told Respondent's foreman at Monroe, Claude Turner, that all the employees had signed union cards. Early in the afternoon of October 30, according to another employee, Kenneth Mumford, Giesy asked who was at the October 27 meeting. Mumford answered that he was and that all

had signed Union cards. Giesy then asked, "Is that what the men want?" Mumford replied, "I guess so" and the conversation ended. On November 2 A. L. Stevens and Claude Shaffer called upon Giesy, represented that they were authorized by a majority of Respondent's employees to negotiate a contract, and requested a meeting for that purpose. Giesy said that he had no employees and that therefore there was "no problem." Also, on November 2 Tom Cook, who had been discharged on the previous Friday and who had on October 27 signed a union designation card, was rehired by Giesy. According to Cook's undenied and credited testimony, Giesy asked on November 2 what Cook thought about the Union. Cook answered that he "didn't think too much about it right at the time." Cook has remained in Respondent's employ. On various dates thereafter up to the time of the hearing, of those who were discharged on October 30, Jess Howe and Ralph Jones were rehired at Corvallis and Floyd Cantrell, Jr., Ellis Conn, Frank and Don Harrington at Monroe. Conn and the two Harringtons were later discharged in circumstances which the General Counsel does not allege to have been discriminatory.¹ Sometime in early March 1954 Claude Turner, Respondent's foreman at Monroe, whose employment had not been interrupted by the discharges, was demoted and sent to Corvallis as an ordinary workman. The Respondent appears now

¹ I have not therefore discussed in this report the validity of the reasons advanced for discharges occurring after October 30, 1953.

to have the same number of employees as on October 30.

In early March the Respondent filed a petition with the Board seeking an election to determine the bargaining representative of its employees. The unit described in the petition is "All regular production, maintenance, warehouse, and clerical employees, excluding managerial employees." This is in substance the same unit set forth in the complaint as appropriate. It appears to be comprised of mill workers whose working conditions and interests are similar and considering further the substantial agreement of the parties, I find that a unit composed of all employees employed by the Respondent exclusive of office, clerical, and supervisory employees as defined in the Act now constitutes and at all times material herein has constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act.

On October 30, 1953, as evidenced by the testimony of the individual employees, 12 of the 13 in the appropriate unit had then designated the Union as their bargaining representative. I find, therefore, that on October 30, 1953, and at all times material since the Union has been and is the exclusive collective bargaining representative of a majority of Respondent's employees in the appropriate unit within the meaning of Section 9 (a) of the Act.

It is the theory of the General Counsel that Giesy, learning that his employees had had a meet-

ing for the purpose of organizing themselves into a union, decided to move quickly to terminate the progress of that development and because of the threat of organization terminated all of his mill workers on October 30. The Respondent insists that no such motification came into play; that the Respondent on October 30 did not entertain a belief that its employees were members of a union or about to become so; and that the discharges resulted solely and exclusively from the asserted fact that continued operation under the then conditions was causing intolerable losses.

To support this theory the General Counsel offered first the testimony of Giesy that he had never favored unions and preferred not to have one in his plant and that Foreman Rudisell and Assistant Manager Crockett at Corvallis were aware of his disposition in that connection. Employee Alec Johnson testified credibly and without contradiction that about mid-September 1953, while discussing unions with Foreman Turner the latter said that if Giesy discovered that the employees had joined a union he would fire every one of them. Employee Frank Harrington testified credibly and without contradiction that on October 30 Foreman Turner told Harrington of overhearing a conversation between Crockett and Giesy to the effect that someone was trying to get a union in the mill. When Harrington asked Turner what he supposed would happen Turner answered, "Well Wayne will just find out who started it and he'll fire him. That's what happened the other time." Frank Harrington

and Don Harrington testified that in February 1954 during the course of a somewhat heated discussion with Giesy the latter said "Before I go union, I'll shoot myself between the eyes."

Turner was not called as a witness although still in Respondent's employ at the time of the hearing. Giesy denied that there was ever an occasion when he discharged anyone for starting a union and disputed the testimony of the Harringtons that he had ever threatened to shoot himself in the event of union organization. What emerges from this testimony however on the point of Giesy's reaction to a threat of organization is that he viewed such a possibility with displeasure. Of course no employer is required to put out the welcome mat for a union and in certain situations is required by the Act to refrain from encouraging his employees in this connection. The testimony as to Giesy's feeling in the matter was received only for the purpose of illuminating the motivation attending the discharges of October 30.

Although the Respondent's volume of business in the past 2 years has been substantial, its profits have been little more than nominal. According to Giesy's credited testimony, at the end of the fiscal year May 31, 1953, a decision was reached to take periodic inventories throughout the ensuing year to determine the Respondent's profit and loss position so that necessary changes in operations could be made quickly. Because of the busy summer season the first inventory was taken at the close of business on September 30 and the result sent to an auditor in the nearby town of Forest Grove. There

followed, according to Giesy, a number of telephone calls from Robert Loomis, the auditor or accountant, advising Giesy piecemeal of Respondent's financial and economic position as revealed by the inventory. Loomis testified that he last spoke to Giesy in the matter 10 days or 2 weeks prior to October 30. On October 30, according to Giesy, he received from the accountant a profit and loss statement indicating a loss from June 1 through September 30 of approximately \$30,000. On the same day, still according to Giesy, in a telephone conversation with someone connected with E. F. Burlingham & Sons, a corporation controlling a substantial stockholding in the Respondent, he was told that some decisive action to avoid the continuation of this unprofitable operation must be taken. The means of accomplishing the curtailment of the loss was left to Giesy's discretion. Giesy could not recall in his testimony the identity of the person giving this instruction. Giesy testified in effect that he knew he must act and act quickly but, being unsure just what steps would provide a solution for the problem, decided to discharge all his employees and to spend the week end in a study of the operations to determine finally what must be done. Due only to the revelations in the profit and loss statement which Giesy insisted he saw for the first time on October 30, did the discharges result. By November 2, still according to Giesy, he had decided to operate a feed mixer and hired Cook for that purpose. Thereafter he hired employees to operate trucks and for general mill work. Since October 30, according to

Giesy, the emphasis in the operations has shifted to grain and feed and away from seeds. During the course of restaffing the operations with old employees and new, wages were raised from the pre-existing rate of \$1.20 per hours to \$1.50, but the general practice of all employees working from 50 to 60 hours a week was discontinued. Truck drivers still work the longer hours but with the new pay rate are not paid premium overtime for hours over 40.

Giesy denied that Mumford made mention of a union on October 30 testifying that Mumford merely said, unsolicited, that some of the employees had met at the home of one of them. The bookkeeper, June Urbach, testified to the same effect.

In December, Ray Joyner spoke to Giesy about returning to work and in the discussion which followed became sufficiently angry to invite Giesy to fight him. Because of the nature of this altercation, Giesy testified, he does not consider Joyner to be re-employable. According to Giesy the business now being carried on cannot profitably use the services of Floyd Cantrell, Sr., although Cantrell before October 30 had worked about 8 years for the Respondent. Giesy characterized the work of Sams as unsatisfactory although Respondent's evidence is that Sams was never seriously criticized for any shortcoming before his discharge and was terminated on October 30 for economic reasons along with the others.

Principally because, based upon observation among other criteria, I do not regard Giesy as a

credible witness and therefore do not accept his explanation that the terminations on October 30 were necessitated and sprang from economic considerations, I am persuaded that the evidence² of the General Counsel tending to show that fear of union organization dictated Respondent's action at that time, establishes the discharges then occurring as discriminatory. I do not credit Giesy's testimony that he first saw the profit and loss statement on October 30. The statement in evidence is a simple one and the only information on it which is significant in respect to the discharges is the showing of a substantial loss. Giesy testified that on a number of occasions during the month of October after the submission of the inventory data to the auditor, he was informed by the latter of developments in the preparation of the profit and loss statement tending to indicate that the operation to the end of

² Witnesses for the General Counsel, I am convinced are entitled to credit. No factor other than the testimony of Giesy tends to cast doubt upon the accuracy of their testimony. I consider it significant that Foreman Turner was not called to the stand to testify concerning statements attributed to him and conclude that he would not have entered a denial. Although by no means dispositive of the question of credibility of Sams and others who were employed at Corvallis, were any of them disposed to color or contrive evidence an opportunity existed after the death of Crockett. However the only incident involving Crockett which tends to support the allegations of the complaint came in first in the testimony of Giesy when he related that Crockett had questioned an employee (Sams) about the meeting of October 27.

September was unprofitable. No such conclusion could have been reached as I read the statement until all of the factors affecting the profitability of Respondent's business had been calculated and appraised in relation to each other. Any information coming to Giesy from the auditor in respect to any single item on the profit and loss statement would seem to be without particular meaning until related to the complete information as to receipts, disbursements, and inventory. My conclusion is that Giesy knew of the profit situation some time before October 30. I do not credit Giesy's uncorroborated testimony that someone in authority over him directed that some drastic action be taken on October 30. It is suggested in the record, although not specifically argued, that because Respondent's business is to some extent seasonal in nature terminations and layoffs are to be expected in the fall of the year. This appears to be true, but by October 30 the Respondent had trimmed its crew of temporary workers and apparently had work for all those who remained. Alec Johnson, who was hired in July or August of 1953, testified credibly and without contradiction that in late October his foreman, Claude Turner, said that he would be kept on to work as a permanent employee. Jess Howe, who was hired at about the same time, testified that about 2 weeks before October 30 Assistant Manager Crockett told him he would be kept on permanently and that Giesy, who did not deny this assurance in his testimony, a few days later affirmed Crockett's statement. It is argued in behalf of the Re-

spondent, based upon Giesy's testimony, that in restaffing the operations Giesy selected from his former employees those whose ability and experience qualified them to do the work which he had available and that he hired new workers based upon the same considerations. I find, however, that the evidence does not establish that any particular skill is required to fill the jobs held by those who were discharged on October 30. The most exacting work was done by the seed cleaners and it appears to be true that following October 30 less seed cleaning was done than before. However, Sams, for example, had worked many years in operations similar to that of Respondent and there is no reason to believe that his services could not have been used by the Respondent in work other than seed cleaning. I credit the testimony of the two Harringtons, and thus discredit that of Giesy, that the latter in February 1954 said that he would shoot himself before permitting the Union to get in to the mills. Of course I do not believe that Giesy intended his statement to be accepted literally, but I am convinced and find that Giesy was strongly and unalterably opposed to the unionization of his working force, and I am convinced and find that the terminations on October 30 sprang directly from this determination. It is true that subsequent to October 30 for a period of months Respondent's operations were on a considerably lesser scale than before. This of course suggests that the Respondent had a need for fewer employees after that date than before and that in any event some individuals

would have found their employment terminated on a date somewhere near October 30. While this consideration in another factual setting might lead to such a conclusion, I am persuaded by a consideration of all evidence concerning Giesy's opposition to the Union that the failure to restaff the mills immediately after the discharges was but part of the entire plan to defeat the employees' desire for representation. Had Giesy immediately hired a number of workers equivalent to those he had discharged the motivation for the discharges would have been too apparent. If the Respondent suffered additional losses by failure to operate at normal capacity for a period following October 30, I believe that it did so as part of a deliberate design to accomplish its principal aim.

The general wage increases made effective after October 30 were, I find, but another implementation of Respondent's design. Such benefits tend to depreciate the value of self-organization and here were given with that aim in view. Of course the wage changes were in derogation of the right of employees to bargain through the Union in such matters.

The altercation between Ray Joyner and Giesy in late December, culminating in Joyner's offer to engage in a fight, evidences conduct on the part of Joyner which I do not condone. I am aware, however, that this unpleasant occurrence took place in a setting where Joyner justifiably believed that he was being discriminatorily deprived of his job. That his restraint was unequal to the stress upon it at

this time does not in my opinion disqualify him for further employment with the Respondent. Giesy had created, unlawfully, the situation which explained Joyner's outburst. I do not believe that Joyner should be penalized for it.

As the motivation for the discharges was to destroy the movement toward organization and, as the Union was and is the exclusive bargaining representative of Respondent's employees in an appropriate unit, I find that by refusing to negotiate with the Union representatives on November 2, the Respondent violated Section 8 (a) (5) of the Act.

I find then that by the statements of Foreman Turner that the Respondent would discharge anyone responsible for starting a union, by Giesy's interrogation of Mumford and of Jones concerning union activity, by Giesy's threat of self-destruction before permitting a union to enter a plant, by the wage increases and the refusal to bargain, and by the discharges of October 30, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and thereby violated Section 8 (a) (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The operations of the Respondent described in Section I above, occurring in connection with its conduct occurring in Section III above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and

tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom and take certain affirmative action which I find necessary to effectuate the policies and purposes of the Act. As the Respondent has unlawfully refused to bargain with the Union, the majority representative of its employees in an appropriate unit, it will be recommended that it be ordered to do so upon request of the Union. Having found that the discharges of October 30 were discriminatorily motivated and amounted to interference, restraint, and coercion of rights guaranteed to employees in Section 7 of the Act, it will be recommended that Respondent, to the extent that it has not done so, offer to each employee discharged on that date immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings suffered as the result of the discrimination against him from the October 30 date until the date he has been taken back on Respondent's payroll or is offered such opportunity. As the complaint does not allege and the evidence does not establish that the discharge of Conn in February and the two Harringtons in March were in any respect in violation of the Act, reinstatement for these three will not be recommended.

Consistent with the policy of the Board enunciated in *F. W. Woolworth Co.*, 90 NLRB 289, it will be recommended that loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the back pay period. Quarterly periods shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which those discharged on October 30 would normally have earned for each quarter or portion thereof until the date of rehire or offer of reinstatement the net earnings of each during those periods.

Conclusions of Law

1. American Federation of Grain Millers, Local No. 61, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All employees, exclusive of office, clerical, and supervisory employees, as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. American Federation of Grain Millers, Local No. 61, AFL, at all times material herein has been and now is the exclusive representative of all employees of the Respondent in the unit aforesaid for purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By unilaterally making wage increases and by refusing to bargain with the above-named union, the Respondent has engaged in and is engaging in

unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By such conduct, by interrogation and threats addressed to employees and by discharging its employees on October 30, 1953, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record of the case, I recommend that Monroe Feed Store, Monroe and Corvallis, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively upon request with American Federation of Grain Millers, Local 61, AFL, as the exclusive representative of all employees at both operations in the appropriate unit in respect of rates of pay, wages, hours of employment, and other conditions of employment.

(b) Interfering with, restraining, or coercing its employees by means of discharge, interrogation, threats, or giving benefits, or in any other manner in the exercise of the right to self-organization, to

form, join, or assist the above-named Union to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to all of its employees who were discharged on October 30, except those who have since been rehired, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

(b) Make all such employees whole in the manner set forth in that section of this report entitled "The remedy" for any loss of earnings during the period from October 30, 1953, to the date of rehire or offer of reinstatement.

(c) Upon request, bargain with the above-named Union as the exclusive representative of Respondent's employees in the appropriate unit.

(d) Upon request make available to the Board or its agents for examination and copying all records necessary to or convenient for an analysis of the amount of back pay due under the terms of this Recommended Order.

(e) Post at its operations in Monroe and Cor-

vallis, Oregon, copies of the notice attached hereto as an appendix. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director for the Nineteenth Region, in writing, within twenty (20) days from the date of this Recommended Order what steps it has taken in compliance.

It is further recommended that unless within twenty (20) days from the date of receipt of this Recommended Order the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring it to take the action aforesaid.

Dated this 26th day of April 1954.

/s/ WALLACE E. ROYSTER
Trial Examiner

APPENDIX

Notice to all employees pursuant to the recommendations of a trial examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will bargain collectively upon request with American Federation of Grain Millers, Local 61, AFL, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached we will embody such understanding in a signed agreement. The bargaining unit is:

All employees, excluding office, clerical, and supervisory employees as defined in the Act.

We will offer immediate and full reinstatement to all of those discharged on October 30, 1953, who have not since been re-employed, and make each of them whole for any loss of pay suffered as a result of the discrimination against them.

We will not by unilaterally changing wages, by interrogation, by threats, or by discharges, or in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist American Federation of Grain Millers, Local 61, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

MONROE FEED STORE

Employer

Dated

By

Representative

Store

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT
AND RECOMMENDED ORDER

Respondent Monroe Feed Store does hereby except to the Intermediate Report and Recommended Order of the Trial Examiner in the above entitled case.

Findings of Fact

Respondent specifically excepts to the following findings of fact:

1. The finding that the discharges of certain employees on October 30, 1953, were discriminatory and

were not necessitated and did not spring from economic considerations (Page 5, Line 11-18, Page 6, Line 19-20).

2. The finding that Wayne Geisy, Manager of Monroe Feed Store knew of the unfavorable profit situation prior to October 30, 1953, and that the testimony of Wayne Geisy that he first saw the final profit and loss statement (Respondent's Exhibit 1) on October 30, 1953, was false, and the finding that Wayne Geisy could not know of the unfavorable condition of the operations until he had received the profit and loss statement (Page 5, Line 18-33).

3. The finding that Wayne Geisy made the statement to Frank and Don Harrington that he would shoot himself before permitting the union to get into the Monroe Feed Store (Page 6, Lines 13-16).

4. The finding that the failure to rehire employees and restaff the working force at Monroe Feed Store immediately after the discharge was part of the design and plan to defeat the employees' desire for representation (Page 6, Lines 27-29).

5. The finding that Monroe Feed Store deliberately inflicted economic loss upon itself by failing to operate at a normal capacity after October 30, 1953, as a part of a design to defeat the employees' desire for representation (Page 6, Lines 32-35).

6. The finding that the actions and attitude of Ray Joyner did not disqualify him from further employment by Monroe Feed Store (Page 6, Lines 48-50).

7. The finding that Monroe Feed Store refused to

negotiate with the union and the finding that the refusal to negotiate violated Section 8(a)(5) of the Act (Page 6, Lines 54-58).

8. The finding that Monroe Feed Store interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

Remedy

Respondent Monroe Feed Store specifically excepts to the following remedy recommended by the Trial Examiner:

1. The recommendation that Monroe Feed Store be ordered to cease and desist from engaging in unfair labor practices (Page 7, Lines 18-20).

2. That Monroe Feed Store be ordered to offer each employee discharged on October 30, 1953, immediate and full reinstatement to his former or substantially equivalent position (Page 7, Lines 27-30).

3. That Monroe Feed Store be ordered to make each employee discharged on October 30, 1953, whole for any loss of earnings from October 30, 1953, until the date said employee has been re-employed or offered re-employment (Page 7, Lines 30-33).

Conclusions of Law

Respondent Monroe Feed Store specifically excepts to the following conclusions of law of the trial examiner:

4. By unilaterally making wage increases and by

refusing to bargain with the above-named union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act. (Page 8, Lines 5-8).

5. By such conduct, by interrogation and threats addressed to employees and by discharging its employees on October 30, 1953, the Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act (Page 8, Lines 10-15).

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act (Page 8, Lines 16-18).

Recommendations

Respondent Monroe Feed Store specifically excepts to the following recommendations of the Trial Examiner that the Monroe and Corvallis plants of Monroe Feed Store, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(b) Interfering with, restraining or coercing its employees by means of discharge, interrogation, threats, or giving benefits, or in any other manner in the exercise of the rights to self-organization to form, join, or assist the above named union to bargain collectively through representatives of their own choosing, to engage in concerted activities for

the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action:

(a) Offer to all of its employees who were discharged on October 30, 1953, except those who have since been rehired, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights of privileges.

(b) Make all such employees whole in the manner set forth in that section of this report entitled "The Remedy" for any loss of earnings during the period from October 30, 1953, to the date of rehire or offer of reinstatement.

(d) Upon request make available to the Board or its agents for examination and copying all records necessary to or convenient for an analysis of the amount of back pay due under the terms of this Recommended Order.

Motion

Respondent Monroe Feed Store excepts to the ruling of the Trial Examiner denying the motion of respondent at the conclusions of the General Counsel's case to dismiss the complaint on the ground that the Monroe Feed Store is not engaged in commerce within the meaning of the Act and on the ground

that the practices charged did not effect commerce within the meaning of the Act and on the further ground that it did not effect the policy of the Act for the Board to take jurisdiction in this case (279, 281, 282).

Respectfully submitted,

/s/ WILLIAM J. MASTERS,

Of Attorneys for Monroe Feed Store

Written request for oral argument is hereby made.

MONROE FEED STORE

/s/ By WILLIAM J. MASTERS,

Of Attorneys

United States of America

Before the National Labor Relations Board

Case No. 36-CA-434

MONROE FEED STORE

and

AMERICAN FEDERATION OF GRAIN MILL-
ERS, LOCAL 61, AFL

DECISION AND ORDER

On April 26, 1954, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent

filed exceptions to the Intermediate Report and a supporting brief. The Respondent also requested oral argument. This request is denied as the record and brief, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

We find that the Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Monroe Feed Store, Monroe and Corvallis, Oregon, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with American Federation of Grain Millers,

¹ We note and correct the finding in the Intermediate Report that Manager Giesy interrogated employee Jones concerning union activity in violation of Section 8(a)(1), as there is no evidence in the record of such interrogation. Accordingly, this portion of the Intermediate Report is not adopted.

Local 61, AFL, as the exclusive representative of all employees in the appropriate unit in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Interrogating employees concerning their membership in, or activities on behalf of, American Federation of Grain Millers, Local 61, AFL, or any other labor organization, in a manner constituting interference, restraint or coercion, in violation of Section 8 (a) (1) of the Act; interfering with, restraining, or coercing its employees by means of discharge, threats, or unilaterally granting of benefits, or in any other manner in the exercise of the right to self-organization, through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to all its employees who were discharged on October 30, 1953, except those who have since been rehired, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

(b) Make all such employees whole in the manner set forth in the section of the Intermediate Report

entitled "The remedy" for any loss of earnings they may have suffered by reason of the Respondent's discrimination against them during the period from October 30, 1953, to the date of rehire or offer of reinstatement.

(c) Upon request, bargain with American Federation of Grain Millers, Local 61, AFL, as the exclusive representative of the Respondent's employees in the appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

(d) Upon request, make available to the Board or its agents for examination and copying all payroll records, social security payments, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due.

(e) Post at its operations in Monroe and Corvallis, Oregon, copies of the notice attached hereto and marked Appendix.² Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon the receipt thereof, and be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

² In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Dated, Washington, D. C., Oct. 29, 1954.

[Seal] GUY FARMER, Chairman
 ABE MURDOCK, Member
 IVAR H. PETERSON, Member
 PHILIP RAY RODGERS, Member
 ALBERT C. BEESON, Member
 National Labor Relations Board

APPENDIX

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will bargain collectively upon request with American Federation of Grain Millers, Local 61, AFL, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached we will embody such understanding in a signed agreement. The bargaining unit is:

All employees, excluding office, clerical, and supervisory employees as defined in the Act.

We will offer immediate and full reinstatement

In the United States Court of Appeals
for the Ninth Circuit

No. 15047

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MONROE FEED STORE, Respondent.

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled “Monroe Feed Store and American Federation of Grain Millers, Local 61, AFL,” the same being known as Case No. 36-CA-434 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on March 9 and 10, 1954, together with all exhibits introduced in evidence and rejected exhibit.

2. Respondent's proposed findings and conclusions received by the Trial Examiner on March 26, 1954.

3. Findings of fact and conclusions of law of American Federation of Grain Millers, Local No. 61, AFL (hereinafter called the Charging Party), received by the Trial Examiner on April 8, 1954.

4. Copy of Trial Examiner Royster's Intermediate Report (annexed to item 7 hereof); and copy of Order transferring case to the National Labor Relations Board, both dated April 26, 1954, together with affidavit of service and United States Post Office return receipts thereof.

5. Respondent's exceptions to the Intermediate Report received by the Board on May 17, 1954, containing request for oral argument before the Board. (Request for oral argument denied—see Board's Decision and Order, pg. 1, par. 1.)

6. Charging Party's telegram dated May 19, 1954, objecting to acceptance and consideration by Board of affidavit annexed to Respondent's exceptions, and urging that Board adopt entire Intermediate Report and Recommended Order. (Granted — see Board's Decision and Order, pg. 1, par. 2.)

7. Copy of Decision and Order issued by the National Labor Relations Board on October 29, 1954, with copy of Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

8. Respondent's motion for order modifying or setting aside the finding, conclusion and recommendation of the Trial Examiner and the Board's Order

with regard to Respondent's violation of Section 8 (a) (1) of the Act, or, in the alternative, for an order reopening hearing for receipt of certain testimony, received by the Board on July 12, 1955.

9. General Counsel's motion for denial of Respondent's motion for order modifying or setting aside, or for reopening hearing, received by the Board on July 22, 1955.

10. Charging Party's objections to Respondent's motions for order modifying or setting aside, or for reopening hearing, received by the Board on July 25, 1955.

11. Copy of Board's Order denying Respondent's motion for order modifying, etc., issued on August 24, 1955, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 30th day of March, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board

[Endorsed]: No. 15047. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Monroe Feed Store, Respondent. Transcript of Record. Petition for Enforcement and Petition for Review of Order of the National Labor Relations Board.

Filed April 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15047

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MONROE FEED STORE, Respondent.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Monroe Feed Store, Monroe and Corvallis, Ore-

gon, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "Monroe Feed Store and American Federation of Grain Millers, Local 61, AFL, Case No. 36-CA-434."

In support of this petition the Board respectfully shows:

(1) Respondent is a corporation engaged in business in the State of Oregon, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 29, 1954, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof post-paid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that

this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 23rd day of February, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed Feb. 24, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

PETITION FOR REVIEW OF FINAL ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

To: The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Monroe Feed Store, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 USC, Sections 151 et seq) hereinafter called the Act, respectfully petitions this Court for review of Orders of the National Labor Relations Board against petitioner, Monroe Feed Store, Monroe and Corvallis, Oregon, its officers, agents, successors and assigns. The proceedings resulting in said orders is

known upon the records of the Board as "Monroe Feed Stores and American Federation of Grain Millers, Local 61, AFL, Case No. 36-CA-434."

In support of this petition, Monroe Feed Store respectfully shows:

1. Petitioner is a corporation engaged in business in the State of Oregon, within this judicial circuit, wherein the unfair labor practice in question was alleged to have been engaged. This Court therefore, has jurisdiction of this petition by virtue of Section 10(f) of the National Labor Relations Act as amended.

2. Upon proceedings had before the Board in said matter, the Board, on October 29, 1954, stated its findings of fact and conclusions of law, and issued an order directed to the petitioner, its officers, agents, successors and assigns. On the same date, the Board's decision and order was served upon petitioner by the Board sending a copy thereof postage paid, bearing Government frank, by registered mail to petitioner's Counsel. On August 24, 1955, the Board, after having duly considered Petitioner's motion and brief for an order modifying or setting aside the findings, conclusions and recommendation of the Trial Examiner and Order of the Board, or in the alternative, for an Order reopening the hearing, issued an order denying petitioner's motion. The Board's order was served upon Petitioner by registered mail August 26, 1955.

3. Petitioner seeks review of the Board's orders on the following grounds:

- (1) Petitioner was denied due process of law by reason of the bias and prejudice of the Trial Exam-

iner in refusing to require that the affidavit of Dave Crockett be produced by the General Counsel of the National Labor Relations Board and admitted into evidence as requested by the Petitioner.

(2) The findings of fact and conclusions of law of the Trial Examiner and the National Labor Relations Board are not supported by substantial evidence on the record considered as a whole.

(3) The Decision and Order of the National Labor Relations Board is not reasonably designed to effectuate the policies of the National Labor Relations Act.

(4) The National Labor Relations Board acted arbitrarily and capriciously, and abused their discretion, thereby denying due process of law to petitioner, by denying petitioner's motion for an order modifying or setting aside the findings, conclusions and recommendations of the Trial Examiner, and Order of the Board, or in the alternative, for an Order reopening the hearing for the receipt of further testimony.

4. Pursuant to Section 10(f) of the National Labor Relations Act as amended, Petitioner is filing with this Court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the Order complained of was entered and the findings and orders of the Board.

Wherefore, your Petitioner prays this honorable Court that it cause notice of filing of this petition and transcript to be served upon Respondent, and that this Court take jurisdiction over the proceed-

ings and of the questions determined therein, and make and enter upon the pleadings, testimony and evidence in the proceeding set forth in the transcript, a decree modifying or setting aside in whole or in part the Orders of the National Labor Relations Board.

MONROE FEED STORE,

a corporation

/s/ By WAYNE R. GIESY,

President

MASTERS AND MASTERS

/s/ By W. MASTERS,

Of Attorneys for Petitioner

[Endorsed]: Filed Mar. 8, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER TO PETITION FOR
ENFORCEMENT

Comes now respondent, Monroe Feed Store, and files its answer to the petition for enforcement as follows:

I.

Respondent is a corporation engaged in business in the State of Oregon, within this judicial circuit, wherein the unfair labor practice in question was alleged to have been engaged.

II.

Upon proceedings had before the Board in the matter known upon the records of the Board as

"Monroe Feed Store and American Federation of Grain Millers, Local 61, AFL, Case No. 36-CA-434," the Board, on October 29, 1954, stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its agents, successors, and assigns. On the same date, the Board's decision and order was served upon Respondent by the Board sending a copy thereof, postage paid, bearing Government frank, by registered mail to Respondent's Counsel. On August 24, 1955, the Board, after having duly considered Respondent's motion and brief for an order modifying or setting aside the findings, conclusions and recommendation of the Trial Examiner, and Order of the Board, or in the alternative, for an Order reopening the hearing, issued an order denying Respondent's motion. The Board's order was served upon Respondent by registered mail August 26, 1955.

III.

Respondent was denied due process of law by reason of the bias and prejudice of the Trial Examiner in refusing to require that the affidavit of Dave Crockett be produced by the General Counsel of the National Labor Relations Board and admitted into evidence as requested by the Respondent.

IV.

The findings of fact and conclusions of law of the Trial Examiner and the National Labor Relations Board are not supported by substantial evidence on the record considered as a whole.

V.

The Decision and Order of the National Labor

Relations Board is not reasonably designed to effectuate the policies of the National Labor Relations Act.

VI.

The National Labor Relations Board has acted arbitrarily and capriciously, and abused their discretion, thereby denying due process of law to Respondent by denying Respondent's motion for an order modifying or setting aside the findings, conclusions and recommendations of the Trial Examiner, and Order of the Board, or in the alternative, for an Order reopening the hearing for the receipt of further testimony.

Wherefore, your Respondent prays this honorable Court that the Court make and enter upon the pleadings, testimony and evidence in the proceedings set forth in the transcript a decree modifying or setting aside, in whole or in part the orders of the National Labor Relations Board.

MONROE FEED STORE,
a corporation

/s/ By WAYNE R. GIESY,
President

MASTERS & MASTERS

/s/ By W. MASTERS,
Of Attorneys for Respondent

Affidavit of Service attached.

[Endorsed]: Filed Mar. 8, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON

1. The Board properly asserted jurisdiction in the case.

2. The Board properly found that by threatening, interrogating and discharging its employees, respondent violated Section 8 (a) (1) of the National Labor Relations Act, as amended.

3. The Board properly found that by refusing to bargain with American Federation of Grain Millers Local 61, AFL, and by granting unilateral wage increases respondent violated Section 8 (a) (5) and (1) of the Act.

* * * * *

Dated at Washington, D. C., this 30th day of March, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed April 3, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON

1. Petitioner was denied due process of law by reason of the bias and prejudice of the Trial Examiner in refusing to require that the affidavit of Dave Crockett be produced by the General Counsel of the National Labor Relations Board and admitted into evidence as requested by the Petitioner.

2. The findings of fact and conclusions of law of the Trial Examiner and the National Labor Relations Board are not supported by substantial evidence on the record considered as a whole.

3. The Decision and Order of the National Labor Relations Board is not reasonably designed to effectuate the policies of the National Labor Relations Act.

4. The National Labor Relations Board acted arbitrarily and capriciously, and abused their discretion, thereby denying due process of law to petitioner by denying petitioner's motion for an order modifying or setting aside the findings, conclusions and recommendations of the Trial Examiner, and Order of the Board, or in the alternative, for an Order reopening the hearing for the receipt of further testimony.

5. Monroe Feed Store did not discharge any employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

6. Monroe Feed Store did not refuse to bargain with the American Federation of Grain Millers, Local 61, AFL, and did not violate Section 8(a)(5) and (1) of the Act by granting unilateral wage increases or refusing to bargain.

Dated at Portland, Oregon, this 5th day of April, 1956.

MASTERS & MASTERS

/s/ By W. MASTERS,

Attorneys for Monroe Feed Store

[Endorsed]: Filed April 6, 1956. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 36-CA-434

In the Matter of:

MONROE FEED STORE

and

AMERICAN FEDERATION OF GRAIN MILL-
ERS, LOCAL 61, AFL

TRANSCRIPT OF PROCEEDINGS

Circuit Court Room, Benton County Court House
Corvallis, Oregon

Tuesday, March 9, 1954

Pursuant to notice, the above-entitled matter came
on for hearing at 10 o'clock, a.m.

Before: Wallace E. Royster, Esq., Trial Exam-
iner.

Appearances: Howard A. McIntyre, Esq., 407
U. S. Court House, Seattle, Washington, appearing
on behalf of General Counsel, National Labor Rela-
tions Board. Paul T. Bailey, Esq., 1130 Southwest
3rd Avenue, Portland, Oregon, appearing on behalf
of American Federation of Grain Millers, Local 61,
AFL, the Charging Party. A. L. Stevens, 310 South-
west Columbia, Portland, Oregon, appearing on be-
half of American Federation of Grain Millers, Local
61, AFL, the Charging Party. [1*]

* Page numbering appearing at top of page of original certified
Reporter's Transcript.

Masters & Masters, by William J. Masters, Esq., 703 Yeon Building, Portland 4, Oregon, appearing on behalf of Monroe Feed Store, the Respondent.

Proceedings

Trial Examiner Royster: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Monroe Feed Store and American Federation of Grain Millers, Local 61, AFL, Case No. 36-CA-434.

My name is Wallace E. Royster, the Trial Examiner designated to hear the evidence and make findings of fact and conclusions of law and recommendations to the Board in respect to the issues.

Will counsel please state their appearances for the record?

Mr. McIntyre: Howard A. McIntyre, appearing for the General Counsel of the National Labor Relations Board, 407 U. S. Court House, Seattle, Washington.

Mr. Masters: William J. Masters, appearing for Monroe Feed Store, 703 Yeon Building, Portland, Oregon.

Mr. Bailey: Paul T. Bailey, appearing for American Federation of Grain Millers, Local 61, 1130 Southwest 3rd, Portland 4, Oregon. [4]

* * * * *

Mr. McIntyre: As General Counsel's Exhibit 1-D, the complaint issued in the name of and against Monroe Feed Store in Case No. 36-CA-434, issued by

Thomas P. Graham, Jr., Regional Director, on the 1st day of February, 1954.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-D for identification.)

* * * * *

Mr. McIntyre: And as General Counsel's Exhibit 1-F, the answer to the complaint in Case No. 36-CA-434, the answer being filed by Masters & Masters, attorneys for Monroe Feed Store, and the answer being a general denial of the allegations of the complaint. [6]

* * * * *

Trial Examiner: All right, the exhibit is received.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification, were received in evidence.)

Mr. McIntyre: I offer this exhibit in duplicate.

Now, Mr. Examiner, I would also desire to move to correct Paragraph VIII on Page 4 of the complaint to read Paragraph XIII, having been a typographical error. Instead of an "X", a "V" was made.

* * * * *

Mr. McIntyre: Also, then, I would desire to have the formal documents comply with the correct name of the store as has been issued in the complaint, naming Monroe Feed Store. [7]

Trial Examiner: With no objection, the documents are all corrected to read "Monroe Feed Store". [8]

* * * * *

WAYNE R. GIESY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Mr. Giesy, what is your full name, please?

A. Wayne R. Giesy.

Q. And what is your address, sir?

A. Monroe, Oregon.

Q. Mr. Giesy, where are you employed?

A. I am employed as manager of Monroe Feed Store.

Q. Now, where is your immediate place of business as manager of Monroe Feed Store?

A. The last few days I've been operating out of the Corvallis plant.

Q. And is that your normal location? Is that the normal location for the manager of Monroe Feed Store?

A. Well, to qualify that, I will have to go back to a summer or two ago. I worked part time at both places.

Q. Well, then, the Monroe Feed Store consists of two operations, or two locations?

A. It consists of a location at Monroe and one at Corvallis.

Q. And what is the type of operation at Monroe Feed?

A. We are grain and seed, feed, and fertilizer.

(Testimony of Wayne R. Giesy.)

Q. And you do the same at both operations in Corvallis and Monroe? A. Yes.

Q. Now, how long have you been manager at the Monroe Feed Store? A. Seven years.

Q. Seven years, and before that time did you have any other position with the company?

A. Monroe Feed Store was a newly formed corporation at that time.

Q. Now, under what State laws was the Monroe Feed Store incorporated?

A. Under Oregon corporation law.

Q. And you are engaged in both buying and selling of feed? A. Yes.

Q. And also grains? A. Yes.

Q. Now, do you manufacture poultry and dairy feed? A. Yes.

Q. Now, do you purchase and sell and manufacture these commodities all in both locations?

A. We do manufacture at both locations. They vary some.

Q. Now, you say they vary some. In which way do they vary?

A. In the machinery that's available at each location.

Q. There are certain types of operations that can be done at one plant that cannot be done at the other? A. Yes. [10]

Q. Which of the two operations is the bigger?

A. The Monroe Feed Store at Monroe has a little more volume than does Corvallis. May I qualify that?

(Testimony of Wayne R. Giesy.)

Q. Certainly.

A. By saying—of sales. That doesn't particularly at all times mean processing.

Q. Now, is the operation a year round operation?

A. I would classify it seasonal to the degree that we accumulate our majority of grains during the harvest period, and then it has to taper off as the year progresses.

Q. In other words, you get all of your raw materials from the immediate area, is that right?

A. Most of the raw materials from the immediate area.

Q. Now, do you get any raw materials from outside of this area?

A. Some of them that we manufacture, we do.

Q. Now, what are those raw materials?

A. Well, those would be such things as meat meal, alfalfa meal, different ingredients that we might mix into feeds.

Q. Now, where do you get your meat meal?

A. Meat meal is purchased generally from the Eugene area.

Q. From Eugene? A. Eugene, yes.

Q. And where do you get your alfalfa meal?

A. Generally from Portland. [11]

Q. Well, actually speaking, although it is not within the immediate area, it is within the State of Oregon? A. Yes.

Q. Now, although you get that from Eugene, is that manufactured in Eugene, do you know?

(Testimony of Wayne R. Giesy.)

A. Yes, that particular product is manufactured in Eugene.

Q. And the alfalfa meal from Portland, Oregon, is that manufactured in Portland?

A. I would say it would probably be manufactured in eastern Oregon and shipped into Portland.

Q. But it is the type of raw material that would be obtainable in the State of Oregon?

A. Yes.

Q. At the present time, Mr. Giesy, what is the volume, or what has been the volume of purchases of raw materials that your company has made for both operations in the past 12 months?

A. Are you speaking of dollar volume?

Q. Dollar volume of raw material.

A. Well, I'm not in a position to answer accurately. I could only make an estimate.

Q. Could you make an accurate estimate, do you believe? A. It would be very difficult.

Q. Is it in excess of \$100,000? A. Yes.

Q. Is it in excess of half a million? [12]

A. I would say it was in excess of a half a million dollars, yes.

Q. Would you say it was as much as a million dollars?

A. You're speaking of both operations?

Q. Yes.

A. Yes, I would say it would probably be close to a million dollars. I wouldn't want to qualify that figure either way because I wouldn't be sure.

(Testimony of Wayne R. Giesy.)

Q. But it would be a figure of around a million dollars? A. Yes.

Q. Now, that would be purchase of raw materials? A. Yes.

Q. That is in a way of speaking of—oh, of grain and meat meal, or whatever it was, and alfalfa meal, and those are the commodities that were to your knowledge all grown and purchased in the State of Oregon? A. Yes.

Q. Now, in the purchases of your materials, do you make any purchases outside the State of Oregon of raw materials, first?

A. I can't think of any occasion that I have right now. It's a possibility that we have some time or other, but I do not recall any right at the moment.

Q. Well, now, have you purchased in the past 12 months any machinery of any kind for the operations? A. Yes. [13]

Q. And what type of machinery have you had occasion to purchase? A. Cleaner——

Q. Pardon?

A. Cleaner—scalper and cleaner.

Q. And what is the approximate price of that cleaner?

A. The cleaner would run about \$4,500.

Q. Now, where was that purchased?

A. Through a Portland agent.

Q. Do you know whether or not that is manufactured in the State of Oregon? A. It is not.

Q. It's not? But you purchased it in Portland, through an agent in Portland? A. Yes.

(Testimony of Wayne R. Giesy.)

Q. Did he have that shipped directly from Portland, or directly from the plant?

A. We picked it up at Portland.

Q. You picked it up in Portland? A. Yes.

Q. Now, did you purchase any other machinery during the past 12 months, other than that cleaner and scalper?

A. We purchased a truck.

Q. A truck? A. Yes. [14]

Q. And was that truck new? A. Yes.

Q. What was the value of it?

A. I would say around \$5,000.

Q. About \$5,000. Where was that purchased?

A. That was purchased here in Corvallis.

Q. Here in Corvallis? A. Yes.

Q. Now, do you know whether or not that was manufactured in Oregon?

A. No, it would not have been.

Q. Now, was there any other piece of machinery that you purchased in the past 12 months for the operation of either operation?

A. I do not recall offhand of any other pieces of equipment.

Q. Now, in the past 12 months, would you say that your volume of sales exceeded a million dollars?

A. Yes, they have.

Q. Now, what are the commodities that you sell?

A. We sell malting barley, we sell wheat, oats, peas——

Q. Peas? A. Peas, hairy vetch.

Q. What was that?

A. H-a-i-r-y — vetch — v-e-t-c-h; common vetch.

(Testimony of Wayne R. Giesy.)

Q. Common? [15] A. Common.

Q. What is this vetch? Is that a poultry feed, or something like that?

A. No. That is a winter cover crop, legume.

Q. Oh.

A. Legume is a nitrogen producing plant that they use for soil building.

Q. And what else? A. Feed, fertilizer.

Q. Is there more than one type of feed?

A. For all types of poultry and livestock, yes.

Q. I mean, it's the one type of feed, and it covers all the poultry?

A. No. It can be dairy feed, hog feed, cattle concentrates. I mean there are various—there's as many as the proprietary houses in Portland provide us with.

Q. And then, besides feed, what?

A. Fertilizers. There are many numerous other seeds that we would handle. I've kind of lost—other than the ones that I have mentioned. I could mention some red clover, metafoxtail, sudan grass.

Q. But they would all come under the category of seeds, is that right? A. Seeds, yes.

Q. And is there anything else? [16]

A. We handle a little hardware equipment from time to time, not very expensive.

Q. That is—— A. Just a minor line.

Q. Now, of the hardware equipment, what would you estimate the total volume of your business in the last 12 months of hardware?

(Testimony of Wayne R. Giesy.)

A. Percentage-wise, it would practically be nil; less than a per cent.

Q. What about seeds? A. Seeds?

Q. About how much in sales did you make of seeds?

A. I would say this year about 15 per cent.

Q. Fifteen per cent? A. Yes.

Q. Now, that would be 15 per cent of what figure? In excess of—

A. I do not recall our sales up to date, but I would say that whatever our sales figure is to date, it would be 15 per cent of the figure in excess of the million dollars.

Q. Well, let's figure a little closer on the million dollars. How much in excess of a million dollars would you say? Would it be as much as 2 million dollars?

A. No, it wouldn't be as much as 2 million dollars.

Q. Would it be as much as a million and a half?

A. I don't think so. It could possibly approach the million and a half figure. I'm not qualified to say without—

Q. Would it be between \$1,300,000 and \$1,500,000?

A. I would say that would be very close.

Q. So then your seed would take about 15 per cent of that figure. Now, what about your fertilizer?

A. Fertilizer would run some place between 10 and 15 per cent.

Q. What about feed?

(Testimony of Wayne R. Giesy.)

A. Feed, I would say, would run 20 per cent.

Q. Twenty per cent? A. Yes.

Q. And what about barley and wheat and oats?

A. That would make up the balance.

Q. The barley, wheat, oats, peas and vetch would make up——

A. No. The vetch would be counted as seed.

Q. Oh, vetch would be counted as seed?

A. Yes.

Q. So then barley, wheat, oats, and seeds would be some place in the neighborhood of 50 per cent?

A. Yes.

Q. Now, how do you prepare the seed when you're getting ready to ship it? First of all, what is the first process for the operation of your seed?

A. We would scale it first. By that I mean make a weight ticket. We would either bin it or pile it up in sacks, depending [18] on the way it was delivered to us by the farmer, and hold it until it would be processed over small cleaners. By that, we run it through a scalping cleaner, a carder, and then a finishing cleaner, and separate all the different items, that were delivered, into separate units for shipment.

From that, we get the clean seed, which, as I say, in this case would be vetch, gray oats, screenings. It might be weed seeds, dirt, chaff, et cetera, and that's packed in that condition. The vetch is fumigated and then put in the car and shipped.

Q. And then when it's to be shipped from the operation, or when it's to be sold, in what manner is it sold?

(Testimony of Wayne R. Giesy.)

A. Carload lots, as a general rule.

Q. Carload lots? A. Carload lots.

Q. And is it bulk in the carload, or is it put in 100 pound sacks, or 200 pound sacks?

A. We have put it in both ways.

Q. Put it in both ways?

A. But generally it is in 100 pound sacks.

Q. Now, in the past 12 months, what was—who did you sell your seed to?

A. Primarily to E. F. Burlingham & Sons.

Q. C. S. Burlingham?

A. E. F. Burlingham.

Q. E. F. Burlingham? [19]

A. And Sons.

Q. And where is their principal office?

A. Forest Grove.

Q. Forest Grove? A. Yes.

Q. Is that in Oregon?

A. That's in Oregon.

Q. And what type of business is Burlingham?

A. I would say they were purchasers and producers of field seeds.

Q. Do you know whether or not they operate in States other than the State of Oregon?

A. Yes, they do.

Q. To your knowledge, what other States do they operate in?

A. I would say they would sell to maybe a dozen or two dozen different States.

Q. Are they known in the general business of seed and feed throughout the country as a multi-

(Testimony of Wayne R. Giesy.)

state operation? Do you know what I mean when I say "multi-state"?

A. Well, I wouldn't say that they were multi-state. I would say that they are Oregon processors and shippers.

Q. Shipping outside the—— A. Yes.

Q. ——State of—— A. Of Oregon. [20]

Q. ——of Oregon? A. Yes.

Q. Now, you sold—about what percentage of the seeds did you say you sell to Burlingham? Would it be close to 100 per cent?

A. Well, I would say 90 per cent of the seeds would go to Burlingham, and perhaps the rest would be diverted into other channels, some of which would be retail.

Q. Well, now, you don't retail seed or feed, or any other commodity, away from Monroe or Corvallis though, do you?

A. No, we haven't, as of up to date.

Q. I mean you don't have a place of retail, other than those two locations?

A. Those two locations are our only places of retail for physical plant operations. We might deliver a load of retail feeds into other areas, or seeds into other areas, should the farmer come in and ask for them.

Q. What I mean is: You don't have a retail store? A. No.

Q. Now, with reference to the seed that you sell, that is made up in carload lots?

A. Generally.

(Testimony of Wayne R. Giesy.)

Q. And is that always sent to the one destination, that that is sold to Burlingham?

A. No. I have no more to do with it than execute their bill of lading that they supply. [21]

Q. And the execution of the bill of lading——

A. Is just deposited at the depot, and mail them the copies of it.

Q. Then, at the time you handle this, or sell it to Burlingham, you have no knowledge of its destination?

A. I can read it off the bill of lading, yes.

Q. In the past 12 months, have you read off of the bill of lading the ultimate destination of any of the seed that you sold to Burlingham?

A. Yes.

Q. Now, was any of that that you sold to Burlingham shipped directly outside the State of Oregon? A. Yes.

Q. Of that that you sold to Burlingham in the past 12 months, what percentage would you say was being shipped directly outside of Oregon?

A. I wouldn't wish to venture a guess. I don't pay that close of attention to them because I relinquish my right to that seed when it's loaded aboard the car.

Q. Well, do you have copies of your bills of lading? A. Yes.

Q. Could you check back over a period of 12 months and by looking at those bills of lading determine where that seed is being shipped?

A. Yes. [22]

(Testimony of Wayne R. Giesy.)

Q. Have you got those bills of lading present?

A. Yes.

Q. Would you examine those now and see if you can make a percentage determination of what per cent in the past 12 months was destined to locations outside the State of Oregon?

Trial Examiner: Do you want the witness to interrupt his testimony at this point to make that examination?

Mr. McIntyre: I would like to, and I would also like to have a brief recess while that is being done.

Trial Examiner: All right, I think we'd better take a recess.

(Short recess taken.)

Trial Examiner: On the record.

Q. (By Mr. McIntyre): Mr. Giesy, during the recess, did you examine your books for the last 12 months to determine the percentage volume of seeds sold to Burlingham that was shipped directly outside the State of Oregon?

A. It would amount to about 41 per cent.

Q. About 41 per cent?

A. Of our total shipments to E. F. Burlingham & Sons.

Q. So that it won't be too difficult to figure the percentages, the value of that seed, would it be valued in excess of \$100,000, of that which was shipped directly outside the State?

A. It wouldn't be probably.

Q. Well, let's see—over \$200,000—\$210,000 worth

(Testimony of Wayne R. Giesy.)

of seed [23] is sold to Burlingham, or has been sold to Burlingham in the last 12 months?

A. Well, you could take 41 per cent of it.

Q. Forty-one per cent of that would have been consigned to points outside the State of Oregon?

A. Yes.

Q. Now, that leaves 59 per cent, and that 59 per cent was sold to Forest Grove, is that right?

A. Right.

Q. Now, do you have any knowledge of the sales of that seed after it gets to Forest Grove?

A. I relinquish all my right to the seed, as I stated before, when it's loaded aboard the car. Therefore, I am not advised any further of what happens to that material.

Q. Then you of your own knowledge do not have any idea what happens to it?

A. I have no records to substantiate the disposition of any of that seed.

Q. Well, now, getting to the fertilizer, where do you ship or sell your fertilizer?

A. We sell all our fertilizer, I would say, in a 30 mile radius of either plant.

Q. And what about the feed?

A. Well, it would be all sold within the State of Oregon.

Q. Now, outside the seed that is consigned to points outside [24] the State of Oregon which you have sold to Burlingham, is there any commodity handled by your stores that is shipped outside the State of Oregon, any other commodity?

(Testimony of Wayne R. Giesy.)

A. None that we have direct loadings on, to my knowledge.

Q. Well, any that you have indirect lading on?

A. Well, I wouldn't have—what I'm driving at: I would not have the information as to what the disposition would be.

Q. Yes, I realize that, but I want to know whether you have—whether you make any shipments, other than seed?

A. We sold last year \$200 worth, I think, of seed into California, and I think I gave that in testimony to your field examiner. To my knowledge, that is the only seed, other than—or any item, other than what goes to Burlingham that we ship directly out of the State.

Q. Well, now, let's see. Based on all figures, your sales of seed, I believe, you estimated came to about 15 per cent of your sales? A. Yes.

Q. And of that 15 per cent, approximately 90 per cent was sold to Burlingham? A. Yes.

Q. And of that 90 per cent, 41 per cent was shipped to points outside the State of Oregon?

A. Yes.

Q. One other thing about the corporation: I believe you [25] stated that the company was incorporated in 1947? A. Right.

Q. Under the laws of Oregon? A. Yes.

Q. And is that corporation—has it been continuously to this date in existence? A. Yes.

Q. And it is the same corporation as was incorporated in 1947? A. Yes.

on them. We would have the invoice.

Q. Well, do you know whether or not that corn came from within the State of Oregon?

A. I couldn't answer it. I would just surmise that it possibly came from outside the State because we're not a corn producing State, but I cannot say definitely whether it did or didn't. [26]

Q. What would be the value in the 12 month period, the last 12 months period, of the corn which was purchased?

A. We would probably purchase from two to three cars of corn.

Q. And what would the value per car be?

A. I would say about \$3,000.

Q. And what about cottonseed meal?

A. Cottonseed meal.

Q. Did you purchase any of that?

A. We purchase that from Stoll in Portland.

Q. And where is that shipped from?

(Testimony of Wayne R. Giesy.)

Q. Now, do you make any purchases of corn?

A. Yes, we do.

Q. Where do you make those purchases from?

A. I purchase those from Fay Malone in Portland.

Q. And where are they shipped from?

A. I would not have that information.

Q. They ship from Portland?

A. I'm not in position to answer because I don't know that. I select the routing on the cars that come in. As a matter of fact, we wouldn't have a routing

(Testimony of Wayne R. Giesy.)

A. I would imagine it would be shipped from California.

Q. No cottonseed meal is made in Oregon, is there? A. Not to my knowledge.

Q. And is it shipped directly from California to your place of operation through your broker? That is, you make arrangements with your broker to have it shipped to you?

A. Yes, we would have some that would come directly to us.

Q. And what would be the value of the cottonseed meal that you have purchased in the last 12 months?

A. Probably between 7 and 8 thousand dollars worth.

Q. Now, did you purchase any fertilizer?

A. Yes.

Q. Did you purchase any fertilizer that originated outside the State of Oregon?

A. I would imagine the majority of it would probably originate [27] outside the State of Oregon, but we purchase it from Oregon people.

Q. You purchase it through a broker in Oregon? A. Through brokers, yes.

Q. And is it shipped directly from its place of origin to your plant? A. Generally it is.

Q. And what would be the value of the fertilizer that you purchased in the last 12 month period?

A. Well, I think I quoted you figures there.

Q. Oh, they would be the same? I have 10 to 15 per cent of your sales. A. Yes.

(Testimony of Wayne R. Giesy.)

Q. And that would be the very same amount?

A. It would be very close to that, I would say.

Q. Then the 10 to 15 per cent of your total sales is also the same figure as is shipped to you?

A. Well, it wouldn't—we would have a markup, of course. You can figure what normal markups are and work back to that, but I do not purchase from other than Oregon brokers.

Q. Well, would you say that you handle fertilizer valued at—or do you import or purchase fertilizer valued in excess of \$100,000?

A. I would say we purchase in excess of \$100,000, yes.

Q. Would you say it would be as much as \$200,000?

A. No.

Q. It would be more than that?

A. I would say very close to the \$100,000 figure, somewheres between 100 and 125 thousand dollar figure.

Q. And where would that ordinarily originate?

A. Canada manufactures fertilizers, California manufactures fertilizer, Utah manufactures fertilizer. I do not know the points of origin. I wouldn't be prepared to even state the points of origin because I haven't paid that close attention to where we have purchased our fertilizer from.

Q. But practically all of it originates outside the State of Oregon?

A. Yes.

Q. That you purchase?

A. I would say so.

Q. What about soybean meal?

(Testimony of Wayne R. Giesy.)

A. Very little soybean meal is purchased, and that we would purchase within the State because we are not prime users of soybeans.

Q. Do they have soybean meal in the State?

A. Well, we would buy it from a stocking warehouse in Portland because we would pick it up in small amounts.

Q. What about millrun?

A. Millrun—I don't know where that is produced, to be very truthful with you. I mean our purchases I haven't followed down. [29] We purchased some of that from Mr. Malone, again. That could be produced by Pillsbury, I presume, there at Astoria; perhaps Crown Mills, Centennial Milling. I'm not sure where the shipments are from.

Q. Is it manufactured in Oregon?

A. Well, there are flour plants in Oregon, which it is a by-product of flour.

Q. But you have no idea—

A. I have no idea as to the origin of our shipments of millrun.

Q. Now, do you make any sales to Kerr Gilford Company?

A. Kerr Gifford?

Q. Gifford, is it?

A. Yes.

Q. Where is that located?

A. Portland, Oregon.

Q. Is that the same type of operation as Burlingham?

A. No.

Q. Is that a local operation?

A. That is grain primarily when I say "no".

(Testimony of Wayne R. Giesy.)

Q. What type of commodities do you sell to them?

A. I sell wheat to them. I have sold barley to them. I have sold oats to them.

Q. Do you know whether or not, of your own knowledge, whether or not they ship outside the State of Oregon? [30]

A. Oh, definitely they would.

Q. What about Archer-Daniels-Midland Company?

A. Their offices are in Portland.

Q. In Portland? A. Yes.

Q. And do you know if they ship outside the State? A. Yes.

Q. And what do you sell to them?

A. We would sell the same commodities.

Q. What would be the approximate value in the last 12 months of the commodities you sold to them?

A. I didn't catch the question.

Q. What would be the approximate value of the commodities you have sold to them in the last 12 months, to Archer-Daniels?

A. Probably \$400,000 worth.

Q. Probably how much? A. \$400,000.

Q. About \$400,000? A. Yes.

Q. What about Balfour Guthrie Company?

A. They're the same type of operators as are Kerr Gifford and Archer-Daniels-Midland.

Q. And what would be the approximate value

(Testimony of Wayne R. Giesy.)

of the commodities you've sold to them in the last 12 months? A. Practically nil. [31]

Q. Practically nil. Now, do you have any other—this Archer-Daniels, are they a brokerage company?

A. No, I can't say that they're definitely brokers. They're grain and storage and brokers.

Q. Do you know if they do any grain storage in the State of Oregon? A. No.

Q. Where is that?

A. They are located at Vancouver.

Q. Vancouver, Washington?

A. Yes. Their offices are in Portland.

Q. When you make your shipment of grain, where do you ship it?

A. To Portland, Oregon, Archer-Daniels-Midland.

Q. Now, is that—but that is in a form that they then would have to do more processing with it, is that not right?

A. They can divert it, or they might resell it. They have the option of moving it to their liking after it hits Portland.

Q. But if they were going to process it, it would then be processed in the operation in Vancouver?

A. Yes, definitely.

Q. Now, outside of the companies that you have testified about here, do you know of any other companies that you have dealt with in the past 12 months, such as Kerr Gifford, Archer-Daniels,

(Testimony of Wayne R. Giesy.)

or Balfour Guthrie, or Burlingham, that you've made sales to?

A. I've sold seeds to Northrup King. [32]

Q. To whom? A. Northrup King.

Q. Northrup King? A. Yes.

Q. Is that a company that ships in interstate commerce, do you know? A. Yes.

Q. Would it fall in the same type of category as Burlingham & Sons?

A. The only thing I have done for them is deliver materials to their Albany plant. I have no information as to the further disposition.

Q. King?

A. Northrup King, same company.

Q. And what would be the value of the commodities you've delivered to the Albany plant in the last 12 months?

A. You're approaching questions now that would be very difficult to answer, I mean, without going entirely through the books, because they are—they might vary from \$5,000 to \$25,000. It is very difficult to remember each sale throughout a year's period.

Q. Would it be possible for it to be in excess of \$25,000?

A. I would say it would be impossible for it to be in excess of that figure.

Q. Would you also hold that it would be [33] impossible for it to be less than \$5,000?

A. That's rather a difficult one to answer. I don't know.

(Testimony of Wayne R. Giesy.)

Q. But your total transactions with them over a period of 12 months would not exceed \$25,000?

A. Absolutely not. It might not even approach that figure.

Q. Well, now, Mr. Giesy, at the present time, you are manager of Monroe Feed, and that covers both stores, does it not? A. Yes.

Q. Now, how many employees do you have as of now that are employed at the Corvallis operation?

Trial Examiner: Are you interested in employees in certain categories, certain classifications? Or, are you interested in office employees?

Mr. McIntyre: Yes, as a matter of fact, I was going to ask for a breakdown after the total, yes, sir.

Trial Examiner: All right.

The Witness: Four are presently employed.

Q. (By Mr. McIntyre): Does that include yourself? A. No.

Q. And what are the job classifications of those four? A. We have a working foreman.

Q. Working foreman?

A. Two cleanermen.

Q. Two cleanermen.

A. And one man that does feed mixing and floor work, whatever [34] it might—warehousing, whatever might be necessary.

Q. General—

A. General duties.

Q. Mixer and general? A. Yes.

(Testimony of Wayne R. Giesy.)

Q. Now, those are the only four employees that you have at Corvallis? A. Yes.

Q. Now, when you state working foreman, what are his duties?

A. He has from time to time cleaned grain. He waits on some of the retail trade, loads trucks, comes into the office to see what orders are to be filled, and general duties of helping line up the shipments.

Q. Now, his title is a working foreman. Where does the foreman part come in?

A. Well, he directs the other men to some degree in the plant.

Q. Does he have the authority to fire any of the employees? A. I would say "yes".

Q. Does he have the authority to hire any?

A. He hasn't had the opportunity as yet.

Q. In your absence; who does the hiring?

A. At present, I have.

Q. In your absence, when in need of another employee, would he have the authority to hire?

A. I don't think that he would put on anyone else, no. [35]

Q. Now, in the direction of work, does he exercise any independent judgment on the direction of the work?

A. Yes. It would be necessary for him to.

Q. It would be necessary for him to exercise independent judgment any time that you were gone anyway? A. Yes.

Q. Is that right? A. Yes.

* * * * *

(Testimony of Wayne R. Giesy.)

Q. Now, to Monroe, how many employees do you have in the Monroe store?

A. I believe nine.

Q. Nine? [36]

A. Yes. I'll count again—nine. [37]

* * * * *

Q. Now, could I have a breakdown of those nine employees, their job classifications?

A. One we have as assistant manager that works in the office and out in the mill whenever it's necessary. One is our field man, works in the field, in the office, and in the mill when needed.

Q. Field man? What is his primary job as field man?

A. Well, it would be divided.

Q. Pardon?

A. It would be divided between some office work, some field work approximately two days a week, sometimes three days a week, and in the mill intermittently.

Q. And other than assistant manager and field man, then who?

A. We have a lady that works in the office doing the books.

Q. Yes.

A. I mentioned the two grindermen. We have two men on trucks.

Q. Two grindermen?

A. Well, the one on the day crew, and the one on the evening.

Q. Yes.

A. And we have a man that does general duties

(Testimony of Wayne R. Giesy.)

around the mill, such as cleaning up, counting sacks, et cetera. Occasionally, he does some floor work, very little, and we have a man that is cleaning up the back of the mill for, oh, I would [38] say a week and a half now.

Q. He's been cleaning up?

A. Cleaning up, rearranging the floor plan of the mill.

Q. Now, is he a full time employee?

A. It will take him full time, yes.

Q. Did you employ him with the intention of having him as a full time employee, or until he's through with the cleaning up?

A. No. If he works out satisfactory on other duties, after he's done with the cleaning, we will keep him as a full time employee.

Q. And who else?

A. Two men that work on the trucks.

Q. Let's see. I have here that you have nine employees.

A. Two men that work on the trucks.

Q. Two men on the trucks?

A. I think that adds up.

Q. Now, those are the nine employees at the company? A. Yes. [39]

* * * * *

Q. Then your two grinder men, you have one in the day and one at night? A. Yes.

Q. And they do—that's their duty? I mean their duties are exactly what their title describes them to be?

(Testimony of Wayne R. Giesy.)

A. I would say grinding and mixing.

Q. Now, how long has the grinderman for the night shift been with you?

A. He has worked intermittently for us since about June or July of '53.

* * * * *

Q. What about your day grinder?

A. He's been there about three years to three and a half years. [44]

Q. And has he always been full time during that three and a half years? A. Yes.

Q. And then you've got a general handy man. What are his—are his hours the same, 8:00 to 5:00, normally?

A. I think that he normally now is working 8:00 to 5:00.

Q. In other words, his hours at least would be as normal as those of the day grinderman?

A. Yes.

Q. And his duties are cleaning up and loading and general jobs that come up around the mill?

A. Yes.

Q. Now, how long has he been with the operation? A. Two years, I believe.

* * * * *

Q. Getting back now also to the—before getting to the—oh, then you've got the one cleanup man, and he's been there for two weeks, did you say?

A. He's been there about two weeks now, yes.

Q. About two weeks? A. Yes. [45]

Q. Did he work before that time?

(Testimony of Wayne R. Giesy.)

A. He has worked for us several years ago, but he hasn't worked for us for a period, I'd say, of three years.

Q. And he is doing cleanup work, or rearranging?

A. Rearranging, and it was necessary to have a man that knew a little bit about grain to do that rearranging.

Q. Is that moving machinery?

A. No. That is moving different types of grain.

Q. Now, you have a mixerman or a mixer that does general work in Corvallis. How long has he been with your operation?

A. I would say about a year.

Q. About a year? A. Yes.

* * * * *

Q. And what about the other cleanerman?

A. The other cleanerman was prior foreman at Monroe that we have transferred to Corvallis. [46]

* * * * *

Q. Now, Mr. Giesy, have you as General Manager of Monroe Feed Store in the past few days either petitioned the National Labor Relations Board or under your immediate direction have had occasion to petition the National Labor Relations Board for a determination of representatives of your employees?

A. We have through our attorneys, Masters & Masters, petitioned the National Labor Relations Board for a vote. I presume that's the way you are putting the question.

(Testimony of Wayne R. Giesy.)

Q. Yes. Now, when was that done?

A. I'll have to refer to Mr. Masters and ask him what specific day it was filed on.

Q. Well, it has been done in the last——

A. Within the last week's time.

Q. Now, in that petition, did you set out what you believed to be an appropriate unit for collective bargaining?

A. I'll have to refer to my attorney again for that answer.

Q. Do you know whether or not—well, you directed that the petition be filed, is that right?

A. I will put it this way, that I was advised within the last two weeks' time that we should file a petition for determination.

Q. Well, now——

Mr. McIntyre: I haven't got a copy of that petition. Do you have a copy of that petition?

Mr. Masters: Yes. Do you want to see it? [50]

Mr. McIntyre: I believe it just happened in the last day or so.

Mr. Masters: I'd like to have this introduced, if you want to look at it.

Mr. McIntyre: All right.

Mr. Masters: You can go ahead and introduce it if you want.

Mr. McIntyre: If there's no objection, I will introduce it as my own. I'd like to have marked for indention what purports to be a copy of a petition for certification of representatives of the Monroe Feed Store employees.

(Testimony of Wayne R. Giesy.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. McIntyre): I show you that petition and ask you to examine it and tell me if that is a true copy of the petition which was filed with the National Labor Relations Board, Sub-Regional office in Portland, Oregon, by your counsel?

A. Yes.

Mr. McIntyre: I offer General Counsel's Exhibit No. 2 in evidence.

Mr. Bailey: No objection.

Mr. Masters: No objection.

Trial Examiner: Without objection, it is received. [51]

(The document heretofore marked General Counsel's Exhibit No. 2 for identification, was received in evidence.)

Trial Examiner: Will you get a copy of this, a duplicate?

Mr. McIntyre: Yes, I'll contact the Portland office. I believe it was just filed yesterday.

Q. (By Mr. McIntyre): Mr. Giesy, I call to your attention the description of the unit which is a description for a unit which would be eligible to vote in this election, and it consists—it is a unit which would include all regular production, maintenance, warehouse, and clerical employees, and it would exclude managerial employees.

Do you consider that a unit appropriate for collective bargaining at the present time?

(Testimony of Wayne R. Giesy.)

A. I would, under the advice of my counsel, consider it to be, yes. [52]

* * * * *

Q. Now, do you know Mr. Stevens of the Grain Millers Union? A. Yes, I do.

Q. Do you recall when you first met Mr. Miller—I mean—Mr. Stevens?

A. I think I met him three or four years ago.

Q. Did you ever meet him in any way connected with your operation of your Corvallis and Monroe feed stores? [53]

A. Very recently. In the early part of November, I met him relative to the operation of the Monroe and Corvallis feed stores.

Q. Now, that was November of 1953?

A. Yes.

Q. Do you recall what day in November that was?

A. I would say it was the 2nd or the 3rd. I'm not sure.

Q. And where was it that you met Mr. Stevens?

A. In the office.

Q. In the office of your store in Monroe?

A. Yes.

Q. And who was present at that time?

A. I believe Mr. Stevens, Mr. Shaffer, and I think that Mrs. Urbach was present at that time.

Q. She is the girl—the lady that works in the office? A. Yes.

Q. And would you identify Mr. Shaffer, if

(Testimony of Wayne R. Giesy.)

you're able to? That is, do you know what Mr. Shaffer does?

A. Yes, he introduced himself at that time.

Q. And who did he introduce himself as?

A. As an associate of Mr. Stevens.

Q. And at that time did you know what Mr. Stevens was?

A. Yes, I had met Mr. Stevens prior through a mutual friend, and he had described his activities, as well as I identifying myself. [54]

Q. Now, do you recall what time of day it was when you met Mr. Stevens and Mr. Shaffer in your office?

A. I would say late afternoon.

Q. Late afternoon? A. Yes.

Q. Now, would you be able to place more definitely what day it was? You say it was either November 2nd or 3rd. Do you know whether or not it would be a Monday or a Tuesday?

A. It would have been a Monday.

Q. It would have been a Monday, and would it be the Monday which would be either November 2nd or 3rd, whichever the case might be?

A. Probably be the first.

Q. Then it would be November 2nd because November 2nd of 1953 was a Monday?

A. Yes.

Q. And it was in the afternoon. Who was the first person to speak when the—that you recall when Mr. Shaffer and Mr. Stevens came into the office?

A. Well, I believe it was Mr. Stevens made

(Testimony of Wayne R. Giesy.)

mention that he was the representative of the men at Monroe Feed Store.

Q. About how long in all did the meeting or the visit take place on November 2nd in your office?

A. Ten minutes.

Q. About 10 minutes, and would you tell—and you did have a [55] conversation at that time?

A. Yes.

Q. Now, would you tell for the record what that conversation consisted of, what you said, and what Mr. Stevens said, what Mr. Shaffer said? First of all, one——

A. I won't identify which one of them said it because I do not recall. I'll state what I remember as being told to me.

Q. Well, first, one other question before we get to that: Where was the girl who works in the office, the lady who works in the office? Where was she at the time?

A. She would have been, I believe, in the inner office.

Q. And how far would that be from the location of your conversation with Mr. Shaffer and Mr. Stevens?

A. It would be 10 feet.

Q. Is there any partition between them?

A. There's an open door and a partition, yes.

Q. From where you were standing at the time, were you able to see her? A. No.

Q. Do you know if the door was open or closed?

(Testimony of Wayne R. Giesy.)

A. The door is open practically 100 per cent of the time. I would assume that it was open.

Q. But where you were standing, you were not able to see the lady in the office?

A. That's right. [56]

Q. In other words, it would be the same as from where Mr. Stevens and Mr. Shaffer were standing?

A. I would say "yes". The door would have been open because I walked through the door, and I wouldn't have closed it for any reason.

Q. It would be, as you say, normally open?

A. Yes.

Q. Now, would you state now what that conversation was that you had at that time?

A. Well, it developed into the discussion that they were attempting to organize a union.

Q. Well, what was said about it?

A. Pardon me?

Q. What was said as near as you can recall the exact words that were spoken?

A. Well, I recall that one of them said that they represented my men and wished to organize a union.

Q. And what did you say?

A. And I said at the time that I didn't have any employees.

Q. Did you have any employees at that time?

A. I had just my office help.

Q. And what then did they say?

A. They said if I didn't wish to cooperate that they would file an unfair labor suit against me.

(Testimony of Wayne R. Giesy.)

Q. What was your answer to that? [57]

A. I don't recall that I had an answer to it.

Q. Do you recall whether or not they said anything else?

A. I don't recall that they did.

Q. Now, thinking back over what your testimony has just been, and what the conversation was at that meeting, can you think of anything else that was said by either you, Mr. Shaffer, or Mr. Stevens?

A. I think that they mentioned that they'd had difficulty with me before and that I hadn't favored some men that favored union activities, and I denied that I had ever taken offense to any man favoring their convictions as far as union activities was concerned, and I think that concluded the conversation.

As a matter of fact, it went as far, as I recall now, that they said I had discharged a man because he had favored union activities, which I have not.

Q. Now, thinking over it all, would you restate what that conversation was and in the best order that you can recall that the conversation took place?

A. Well, first of all, I'd like to make this statement, if I may: That on the Saturday afternoon following the lay-off on the Friday, I was visited by one man who at that time indicated to me that the men that I had discharged had been dissatisfied, according to him, and had favored a union.

So, when Mr. Stevens and Mr. Shaffer walked in,

(Testimony of Wayne R. Giesy.)

I had expected somebody to come in, which would only substantiate what [58] the individual had told me. So, in the conversation, my thinking had been drawn out that far up to that time.

So, when Mr. Stevens and Mr. Shaffer came in, they stated, I think in their first bit of conversation, that they represented the men in our plant and wished to organize a union, and I at that time stated to them that I didn't have the working employees in the plant, and that they didn't represent them because they weren't my employees, in——

Q. And then what did they say?

A. ——relationship to me. Then it developed into the discussion that they thought that at some time before I had discharged an individual because he had talked union, and I denied it at that time, which I will go further to say that the individual that they spoke about was Mr. Don Thorne, and I had no knowledge of Mr. Don Thorne's interest in the union, and I had transferred him from the back of the mill to try to make a field man out of him, and he terminated his employ of his own accord.

Q. That was some time back?

A. That was some time back, and that was the discussion that they accused me of at that time.

Q. Did they ask you who your legal counsel was at that time?

A. No, they did not, to my knowledge.

Q. Now, was there anything else to that conversation?

(Testimony of Wayne R. Giesy.)

A. I don't recall anything further. [59]

* * * * *

Q. Well, now, when was the very first time that you had any knowledge that the employees in your plant were considering a union?

A. On the Saturday afternoon that Mr. Cantrell came in and specifically said that the boys had been considering a union.

Q. Now, I ask you, Mr. Giesy, if, before that Saturday afternoon, you did not have some conversation with Mr. David Crockett?

A. Yes, I did have.

Q. And when was that conversation?

A. I would say perhaps a week earlier, to my knowledge.

Q. Would it have been some time around October 28th or 29th?

A. Yes, I think it would have been, since I think of it, because I believe I was on a trip the first part of that week.

Q. So that—now, who is David Crockett?

A. David Crockett at that time was the assistant manager of the Monroe Feed Store, and his point of operation was Corvallis. [60]

Q. And his normal place of operation was Corvallis, was it not? A. Yes.

Q. And would you say that you visited—at that time that you visited the Corvallis plant more often than he visited the Monroe plant?

A. I would say "yes".

Q. In other words, it would be quite rare any-

(Testimony of Wayne R. Giesy.)

way for Mr. Crockett to have occasion to come to the Monroe plant?

A. No, quite the contrary. It would be very often that he would come to the Monroe plant.

Q. How often would he come there?

A. I would say two or three times a week.

Q. Now, you did then have a conversation with Mr. David Crockett some time around October 28th or 29th about the union, did you not?

A. Mr. Crockett told me at that time that he had heard at the Southern Pacific Railroad that the boys had considered a union, and that they'd had a meeting some place in the rural area, and Mr. Crockett also told me at that time that he had pinpointed the individual, and the individual denied that they had had any union activity, that it wasn't a union meeting, and no union men were there, and I dismissed it as being not anything to do with organization because I would have no reason to believe otherwise. [61]

Q. Did he tell you that they had already had a meeting, or that they were going to have one?

A. No. The man, when he related his tale to Mr. Crockett, told him that the boys had had a get-together, but it was not a union meeting, and there were no union representatives there.

Q. Was the person who related it to Mr. Crockett at that time an employee of your company?

A. Yes.

Q. Is it not true that it was pinpointed more

(Testimony of Wayne R. Giesy.)

direct, and it was pinpointed to the very location, the very town that it was?

A. I think it was pinpointed to the very town it was, yes.

Q. And what was that town?

A. Bellfountain.

Q. Bellfountain? A. Yes.

Q. So then, either October 28th or 29th of 1953, you learned from Mr. David Crockett, who was the manager or assistant manager in Corvallis, that he had learned from the Southern Pacific depot, from an employee there, that there was going to be or that there was a get-together, or union meeting, at Bellfountain? A. That is——

Q. Of your company employees?

A. That is what Mr. Crockett developed and had refuted by the individual. So, I took no stock in it, other than rumor. [62]

Q. Now, what did Mr. Crockett advise you at that time as to whether he had taken any steps to learn if that was true?

A. He had told me at the time we discussed the matter that he had learned about the meeting, and he had also asked the man about it, and it was denied that there was any union activity, and there was no reason for me to believe any further.

Q. Did Mr. Crockett also tell you that he had asked if it had been a union meeting?

A. Yes, he had advised me that on that visitation. [63]

(Testimony of Wayne R. Giesy.)

* * * * *

Q. Now, you had, I believe you stated, on Saturday—the Saturday before November 2nd—you had some conversation with one of your employees relative to the union? A. Yes.

Q. Now, where did that conversation take place? A. In the office at Monroe. [67]

* * * * *

Q. Now, who was the employee that you had the conversation with? A. Floyd Cantrell, Sr.

* * * * *

Q. Now, was this conversation on Saturday relative to the lay-off?

A. It had to do with the lay-off, yes.

Q. And did it also have to do with the union?

A. He brought the union in it at that time. That's the first.

Q. That was the first at that time?

A. Yes, that was the first that I knew about the union.

Q. Were there any other topics discussed at that time?

A. Yes, there were other topics discussed, such as, I think [68] the one he mentioned, was that I hated to see a man stand idle, and we discussed other items.

Q. Well, now, going back over that conversation, would you repeat now for the record what that conversation was that you had with Mr. Cantrell, Sr., I believe it is, is it not?

A. Yes, it's Sr.

(Testimony of Wayne R. Giesy.)

Q. On Saturday, October 31st.

Trial Examiner: 30th, according to the calendar, I believe.

Mr. McIntyre: Saturday would be the 31st, and Sunday would be the 1st, and Monday would be November 2nd.

Trial Examiner: That's right.

* * * * *

Q. But on this Saturday morning, you had nobody but the office force?

A. That is correct.

Q. Now, what had happened in the meantime with the other employees you had, the production and maintenance employees?

A. The evening before, I had discharged all the production and maintenance employees.

Q. Now, did you lay off or did you discharge Mr. Cantrell, Sr.?

A. Without being entirely sure, I think I would term it a lay-off at the present time.

Q. Well, where did it take place?

A. Where did the lay-off take place?

Q. Yes, where did this action to terminate the employees take place?

A. In the Monroe office.

Q. In the Monroe office? A. Yes.

Q. And was there anyone there, other than the employees of the Monroe operation?

A. When they were laid off? [71]

Q. That was October 30th when they were laid off? A. I don't think so.

(Testimony of Wayne R. Giesy.)

Q. The employees from Corvallis were not there? A. No.

Q. Now, who were the employees as of that date, October 30th, 1953?

A. Of the Monroe operation?

Q. Of the Monroe operation?

A. Well, I could look up here and—Floyd Cantrell, Jr., and Floyd Cantrell, Sr.

Q. Well, now, if you will, so we won't have to go back over it, if you will state their name and what their job was.

A. All right. Floyd Cantrell, Jr., was a truck driver. Floyd Cantrell, Sr., was a cleanerman. Don Harrington did some cleaning and other work around the warehouse. Frank Harrington did cleaning. Ellis Conn worked on the grinder and mixer. Tom Cook worked on the grinder and mixer. Ray Joyner, I believe, was working a half a day at the time, and Kenneth Mumford worked on the floor some and other odd jobs.

Q. And that was the total of the employees at Monroe? A. I believe it was.

Q. On October 30th?

A. Yes. Oh, there was one other one. Mr. Johnson worked on the cleanup.

Q. Mr. Johnson? A. Yes.

Q. Now, those were the total employees that were employed at the Monroe operation on October 30th? A. Yes.

* * * * *

Q. Now, their employment was all—were all of

(Testimony of Wayne R. Giesy.)

their terms of employment terminated on that date?

A. Yes.

Q. And what time of day was it?

A. It was 6 o'clock in the evening.

Q. And did you—how did you go about advising them? A. How did I advise them?

Q. That they were through?

A. As the men came into the office, as they all gathered in the office, why, I advised them that it was necessary for us to discontinue our operation due to the fact that we hadn't done well economically. [73]

* * * * *

Q. Now, just what words did you use in telling them that their employment was terminated?

A. As I recall it, I told them that we were compelled to shut down at least for the present due to reasons of not an economical operation.

Q. And those were the words that you used?

A. As nearly as I can recall. At least, that was specifically the meaning.

Q. Now, since that date, have you advised any of those other employees that their termination is in any other status than it was on that night?

A. I think that it was the general feeling, at least for myself, and I think it was understood by them that we were to discontinue until we could find an economical way to operate, and at that time I don't think that anything further was stated to them. [74]

(Testimony of Wayne R. Giesy.)

* * * * *

Q. Now, before that date of October 30th, did you—before the date of October 30th, you had had a conversation with Mr. Crockett, either on October 28th or 29th, relative to a meeting in Bell-fountain, is that not right? A. Yes.

Q. Which you have already testified to?

A. Yes.

Q. Now, did you have any other conversation with any of the other employees, or with any of the employees, or any of your other supervisors, before October 30th at 6 o'clock, or the conversation that you had with Mr. Crockett relative to the union?

That's a long question. If you don't understand all of it, I will——

A. Yes. I believe Kenneth Mumford came into the office on Friday and purchased something from the firm, and, at that time, he made some mention as to a get-together that the boys had had, nothing about union meeting, nothing about union activity.

Q. What did he mention then?

A. Only a get-together.

Q. Well, how did it come up?

A. He brought it up himself. [75]

Q. Who was in the office?

A. I believe June Urbach was in the office at that time.

Q. Do you know for sure if she was?

A. I would say she was, yes.

Q. And was there anyone else?

(Testimony of Wayne R. Giesy.)

A. There was a farmer, I believe, in the office at that time. I can't recall who it was.

Q. And was there anyone else?

A. Not to my knowledge.

Q. Now, what time of day was it?

A. I would say some time after dinner.

Q. Some time after dinner? A. Yes.

Q. That again is the noon hour?

A. I'll call it lunch from now on.

Q. Now that you have recalled who was there, the time of day it was, and what day it was, will you state what the conversation was that was said by Mr. Mumford, and what you answered in return?

A. Only that he mentioned the boys had had a get-together, which just substantiated what Mr. Crockett had told me.

Q. Did he mention where it had been?

A. Yes, I think he mentioned it had been——

Q. Did he mention who was there?

A. No, he did not mention who was there. [76]

Q. Now, did he mention what the purpose of it was for? A. No.

Q. Well, was it customary for Mr. Mumford to advise you every time the employees did have a get-together?

A. Nothing other than being friendly towards myself. I presume that I have done him a few favors, and we just conversed on a friendly basis. It wouldn't be anything further than that. I wouldn't think it would be customary for him to

(Testimony of Wayne R. Giesy.)

tell me all his actions. He might make mention of them himself.

Q. Now, other than your conversation with Mr. Mumford and Mr. Crockett, before October the 30th at 6 o'clock, had you had any conversation with any of the employees or other supervisors relative to the union problem? A. No.

Q. Now, up till 6 o'clock of October the 30th, had you advised any of the employees that the company was in such a status as it would be necessary for a reduction or a lay-off? A. No, sir.

Q. Then on October 30th, that was the very first knowledge of the results of what you divulged to the employees, that there was to be a lay-off?

A. That is right. [77]

* * * * *

Q. Now, after the lay-off of October 30th, when was the first time that you took back any employee?

A. I think about Tuesday or Wednesday of the next week.

Q. Tuesday or Wednesday of the next week, and who did you take back? A. Tom Cook.

Q. Tom Cook. What job did he go back on?

A. Grinding and mixing.

Q. That was the same job that he had held before? A. Yes, sir. [78]

* * * * *

Q. At that time—at the time that he was going back to work, or he was advised that he was to go back to work, did you have any conversation with him relative to the union at that time?

(Testimony of Wayne R. Giesy.)

A. As I recall, the union activity was mentioned.

Q. Union activity, meaning what?

A. He mentioned that there had been some signing of cards.

Q. Some what? A. Pardon me?

Q. He mentioned what?

A. That some of the boys had signed union cards, or interest in the union. I'm not acquainted with it because I have not seen any of the cards, or do I know what they are specifically.

Q. What did you say when he told you that?

A. I would have—or I did tell him that the lay-off didn't [80] have anything to do with the union activity, because it was economy and that was the only premise that I could stand on, and it will go back to any testimony that you wish to take from me.

Q. Did he tell you whether or not he had signed a card?

A. Yes, he said he had signed a card.

Q. And did he say anything else?

A. No, I don't recall that he did.

Q. Do you recall the fact that he stated that he had signed a union card, but that he was not particularly for the union?

A. I think that was the conversation, yes.

Q. Now, who was the next employee that you called back to work?

A. I believe Floyd Cantrell, Jr.

Q. When was he called back to work?

(Testimony of Wayne R. Giesy.)

A. I think a couple of weeks later.

Q. A couple weeks later? A. Yes.

Q. What job was he called back to?

A. Truck driving.

Q. Is that the same job he had held before?

A. Yes.

Q. Was he called back at the same rate of pay?

A. No, he was not called back at the same rate of pay.

Q. Was he called back at a higher rate of pay? [81]

A. He was called back at \$1.50 an hour based on a subsequent contract that we could arrive at for having the hauling done for that figure. [82]

* * * * *

Q. Now, who was the next man that you called back to work?

A. I think Frank Harrington.

Q. Frank Harrington, and what was his job?

A. Cleaning again.

Q. And what was he before?

A. Cleanerman.

Q. When was he called back to work?

A. I would say some time along in January.

Q. Some time in January?

A. Yes, the latter part.

Q. Pardon?

A. I think the latter part of January. * * * * *

Q. Then who was the next man you hired back?

A. I think Don Harrington. [84]

(Testimony of Wayne R. Giesy.)

Q. Don Harrington, and when did you hire him back?

A. I think along about the first week or so in February.

Q. First week in February? A. Yes.

Q. What did you hire him back as?

A. He did odd jobs, such as he'd been doing before, no specific work. [85]

* * * * *

Q. Well, when the Harringtons were called back, both Frank and Don, what was their rate of pay? Was it higher or lower than when they had been laid off?

A. It was the same as when they were laid off.

Q. What was it when they were laid off?

A. \$1.20 an hour.

Q. \$1.20 an hour? A. Yes.

Q. And they were called back at \$1.20 an hour?

A. I believe so.

Q. Did that also provide for overtime?

A. Yes.

Q. And was there overtime at that time that they were called back?

A. Well, without going back to the time book, I believe that they were hired at the same rate, and, shortly thereafter or maybe in the interim between hiring one or the other, we decided to try the basis of 40 hours at \$1.50 an hour straight through for all the maintenance workmen in the mill. [87]

(Testimony of Wayne R. Giesy.)

* * * * *

Q. In the meantime, had any other employees been laid off, any of those that you had called back, namely, Tom Cook, Cantrell, Jr., Frank Harrington, or Don Harrington?

A. I'll have to go back and correct that down here. I've gotten out of chronological order.

We had hired Ellis Conn back, I think, as the third man being hired back.

Q. The third man? He was hired back right after Cantrell, Jr., and before Frank Harrington? [89]

A. I believe so.

Q. Now, then, Mintonye—then your work force at that time, was it made up of Tom Cook, Cantrell, Jr., Frank Harrington, Don Harrington, Conn, and Mintonye?

A. When we took Mintonye on as a truck driver, we had discontinued having Ellis Conn as a mixerman.

Q. Then who was the next person you called back?

A. I believe that includes all of them up to date at the Monroe plant.

Q. At the Monroe plant?

A. Yes. Now, let me go back over the total list of who are working there now so I haven't missed any or gotten any out of order. I have mentioned Tom Cook, Floyd Cantrell, Jr., Frank and Don Harrington, Ellis Conn—we have one other employee there—Elmer Simons.

(Testimony of Wayne R. Giesy.)

Q. Simons? When was he employed?

A. Well, he was employed for trucking, and, when we discharged Ellis Conn, we transferred him to mixing and employed Mintonye. [90]

* * * * *

Q. Now, then, in the meantime, have you discharged any of those persons that you just named?

A. Yes, I have.

Q. Who were they?

A. I have let Frank and Don Harrington go, and we have transferred the foreman from the other plant. We made him a cleanerman at this plant at Corvallis.

Q. At the present time, who are your truck drivers? A. Who are the truck drivers?

Q. Yes.

A. Floyd Cantrell, Jr., and Mintonye.

Q. Now, on October 30th, 1953, who were your truck drivers?

A. Floyd Cantrell, Jr., and I think perhaps one of the Harrington boys occasionally did some trucking, and Elmer Simons.

Q. Was Simons employed on October 30th?

A. He might not have been employed on that specific date, but he had been employed intermittently all through the summer and fall, and whenever we had employment for him to do.

Q. Then one of the Harringtons—what was it, Don Harrington who did the truck driving, or was it Frank?

A. I think it was Don Harrington did some of the trucking. [91]

(Testimony of Wayne R. Giesy.)

Q. Why didn't you hire him back as a truck driver instead of Mintonye?

A. We employed Don Harrington back into the mill because he had experience with the grain and the seeds, and how it should be handled in there, and we told he and Frank at the time we employed them that we would try to operate as far as possible and as long as possible if they could keep the mill in a good shape and in tidy order.

On January 31st, after spending some two months cleaning up the plant and getting it into a chronological order of all lots and varieties and kinds, we took an inventory. In three hours, two men took the entire inventory at Monroe. At the end of February, on February 28th, or 29th, whichever the day was, we started in to take the inventory after having the two men in the back cleaning and warehousing, and it took the two men two days to take that same inventory we took in three hours the month before.

It was my decision at that time that they had not fulfilled their portion of the bargain.

Q. Well, the Harrington boy was a truck driver up till October 30th?

A. No, he wasn't entirely a truck driver. He worked in the mill and on the truck and in shipping. He was not a truck driver. [92]

* * * * *

Q. Now, getting to the Corvallis plant, who was employed in the Corvallis plant as of October 30th, 1953?

(Testimony of Wayne R. Giesy.)

A. Webster Sams, Ralph Jones, Jess Howe, Mr. Gann——

Q. Mr. who?

A. Mr. Gann—G-a-n-n, and I failed to mention we would still classify him in an employee classification; however, he is in the hospital at this time, and it has been necessary for us to put on additional help to take his place.

Q. Was Mr. Gann in the hospital at the time of—— A. Right now, presently.

Q. Presently?

A. And it is necessary for us to have another man to take his place at the Corvallis plant.

Q. Now, Webster Sams, Howe, and who else did you say? Gann?

A. Ralph Jones, Mr. Gann, and Whalen Emerson.

Q. Now, what was Gann's job on October 30th?

A. He did some office work, some retail trade, some warehousing, wherever he was needed.

Q. What is he doing now? What job is he classified as although he's in the hospital?

A. I would classify him as a maintenance and operation employee.

Q. Has he continued in employment through from October 30th [93] on? A. Yes.

Q. Was he ever laid off? A. No.

Q. Then who directed the lay-off in Corvallis?

A. I directed the lay-off in Corvallis.

Q. And did you lay them off yourself?

A. No. Mr. Crockett did.

(Testimony of Wayne R. Giesy.)

Q. Did you advise Mr. Crockett what the reason was for the lay-off?

A. He and I discussed it on the afternoon of the 30th prior to the lay-off.

Q. And what did you advise Mr. Crockett to do?

A. To trim his operation down to the same size of operation that we had at Monroe until such time as we could develop what we were going to operate, and how we would operate it.

Q. You mean, down to the office force?

A. Yes.

Q. And do you have knowledge whether or not he did that? A. I believe he did.

Q. And then how were the persons hired back at Corvallis plant?

A. Mr. Crockett had the supervision over hiring any employee that was hired back there.

Q. And you don't know what order they were hired back?

A. No. It was left entirely up to him on his preference. [94]

Q. Who is being employed now by the company in the Corvallis plant?

A. Jess Howe, Ralph Jones, and Claude Turner.

Q. Now, of those persons at the Corvallis plant, have you had any conversation with them, either before or after October 30th, 1953, about the union?

A. I think in the last few days Ralph Jones and I have had a conversation regarding the union activities, since we knew that there was going to be a trial.

(Testimony of Wayne R. Giesy.)

* * * * *

Q. Now, when did you first learn that it was going to be necessary to make the lay-off of October 30th?

A. On May 31st, of 1953, we closed our fiscal year, and our operation had not been satisfactory profit-wise. At that time, Mr. Burlingham and Mr. Loomis called to my attention our cost ratios of production against profit. Immediately following [95] that, some time I would say in June or July, they instigated the inventory-taking system once each month. Realizing it would be difficult to start during the harvest time, they allowed us to take our first inventory as of September 30th, and, on the records that were developed on September 30th and given to the main office, those were the records we used for the—or that I used for the basis of this lay-off.

Q. Now, when did you learn of those records, and who did you learn them from?

A. I learned them from both Mr. Loomis and Mr. Burlingham, and I learned of them through—periodically from October 1st until the 30th when the final report was given to me.

Q. Now, you state periodically. What do you mean when you say “periodically”?

A. Perhaps every two or three days I would be asked questions about the operation and given information as to how the inventory or the profit statement would show.

Q. When was the last time before October 30th—

(Testimony of Wayne R. Giesy.)

when was the last time that Mr. Burlington contacted you relative to the labor problem?

A. I would say within—with the labor problem?

Q. Yes, within—Mr. Burlingham talked to you about this inventory?

A. Mr. Burlingham I don't think particularly pinpointed it as a labor problem. Mr. Burlingham only mentioned to me my cost [96] ratio between labor and production was not satisfactory. Now, I cannot tell you the particular date, but I would say it was some time in October, at least more than once, and very definitely on the 30th when he had the final report in his hands also.

Q. If I told you that Mr. Burlingham said that he only talked to you 10 days before the lay-off and didn't talk to you after that, what would you say?

A. I would say that Mr. Burlingham is incorrect.

Q. And when was the time that you had a conversation with Mr. Loomis?

A. I would say that I had a conversation with Mr. Loomis periodically from the 1st of October on, about getting the records forward, and I would say that I had a conversation with Mr. Loomis on the 30th day of October and advised to bring all my records to Forest Grove to check every item that they had there.

Q. Isn't it a fact also that you were told as early as the middle of October that the inventory showed that there had to be some kind of a reduction?

A. Yes, I think so.

Q. By Mr. Loomis?

(Testimony of Wayne R. Giesy.)

A. By Mr. Loomis, yes.

Q. And is it also true that, as early as the middle of October, you were advised by Mr. Burlingham the status of your records? [97]

A. I don't think it was specifically pinpointed because the final record to me was not available until October 30th.

Q. But you did learn about the status at least in the middle of October, did you not?

A. I learned that they weren't satisfied particularly with the results that they were showing by the middle of October, but I hadn't learned the final decision as to what the P. and L. showed until October 30th.

Q. Then after you learned in the middle of October that something had to be done, or that your records were in such a state that it would be necessary to make economic corrections, did you advise any of your employees of such?

A. The only one I discussed that with was Dave Crockett.

Q. Now, did you ever make the following statement to Mr. Frank Harrington or to Mr. Don Harrington: Before you'd have the union in the plant, you'd shoot yourself between the eyes?

A. No, sir.

Q. It's your testimony now that you never made that statement to either one of the Harringtons?

A. I'm making that testimony now. I'll go further: I've never made that kind of a statement to anyone.

(Testimony of Wayne R. Giesy.)

Q. Is that your memory?

A. No. That's just positively a fact.

Q. Your memory, as far as that subject goes, is much keener than the conversation—the memory of your conversations?

A. No. I know I wouldn't make that statement to anyone. There would be no occasion for me to make a statement such as that. [99]

* * * * *

Q. Now, the regularly hourly paid production and maintenance employees since October 30th, 1953, have had their hourly rate increased to \$1.50 from \$1.20, is that right? A. Yes.

Q. And they've gone on a 40 hour week?

A. Yes.

Q. Now, what about the status of your salaried employed people? Have their salaries been increased also?

A. Some of them have been increased, yes.

Q. And has Mr. Gann?

A. Mr. Gann wasn't on salary until the middle of January, and that's the first we put him on a salary. [102]

Q. What about Mr. Turner?

A. Mr. Turner's salary has been increased.

Q. And what about Mr. Rudisell?

A. Mr. Rudisell's salary has been increased.

Q. And what about the field man at Monroe?

A. His salary has been increased.

(Testimony of Wayne R. Giesy.)

* * * * *

Q. What about Mr. Simons? He's working at Monroe now? [103]

A. Yes.

Q. And what's his job? A. Mixerman.

Q. And when was he first employed?

A. Well, I think on the mixer he was first employed—well, he was employed the date that Ellis Conn's termination was effective.

Q. What did you terminate Mr. Conn for?

A. He did not show up for work.

Q. Is it customary to terminate a man when he doesn't show up for work?

A. Over a period of time. He hadn't shown up for work several times, and we did not wish to get back into those kind of habits.

Q. Did you ask him where he was?

A. We had information that he'd been at the beer parlor the evening before and had a scrap, and that was the information that came to me.

Q. Did you ask him if that was true?

A. I had it verified. [104]

* * * * *

Q. Now, do you have an employee by the name of Mr. Savasky, or some such name as that?

A. Zabodsky—Z-a-b-o-d-s-k-y.

Q. And where is he employed?

A. He is now cleaning up the mill of the mess that was made during the month of February. He's rearranging, dumping screens.

Q. He's then in the back? A. Yes.

(Testimony of Wayne R. Giesy.)

Q. Now, in all the years that you've worked there, has that job never been done before?

A. That has been one of my ills that I haven't been willing to start up and keep in effect. We have to keep our operation tidy from now on out, or we just can't operate the mill.

Q. Before hiring him, did you attempt to hire any of the other employees who you had laid off on October 30th?

A. None of the other employees, as far as my judgment was concerned, were capable of taking care of that particular job.

Q. Of cleaning?

A. No; of sorting and rearranging. [105]

* * * * *

Q. What particular skill do you have to have to carry out this job of Zabodsky's?

A. Zabodsky at one time had been our foreman in the Monroe plant, and he had quite a bit of experience in that particular type of work.

Q. When had he been the foreman?

A. He had been the foreman probably from 1947 through '49. * * * * * [106]

Q. (By Mr. McIntyre): Do you have a Grant Roberts working for you now?

A. I have had a Grant Robbins——

Q. Robbins?

A. ——working for me two Saturdays. I employed him specifically for the reason that he is the son of a high school football coach, who I went to school with, and since is deceased. He's in college,

(Testimony of Wayne R. Giesy.)

and I employed the boy on two Saturdays up to date.

Q. He's not considered as a regular employee?

A. I would say not.

Q. Now, on the two Saturdays that he has worked, what type of work was it that he did?

A. One Saturday, he spent the entire Saturday with the broom just cleaning up. The other Saturday, he did various jobs.

Q. The work that he has done, is it work that is expected and has been done in the past in the ordinary course of your business? [111]

A. Cleaning up has been expected, but it hasn't been done.

Q. But it is work that has been done in the past?

A. It hasn't been done. That's the point that we're making here. It never has been done satisfactorily, the clean-up work.

Q. You mean your company has operated since 1947 and hasn't been cleaned up until that Saturday?

A. No. I said satisfactorily.

Q. Did you ever advise—who was responsible on October 30th of 1953 for the cleaning up in the Corvallis plant?

A. We have discussed that with the men at various times, and it's the most difficult job we have to force the men to do the cleaning up. They have cleaned it up from time to time, and it has been very difficult to execute it so that it would be done as often as is necessary to even meet our insurance requirements.

(Testimony of Wayne R. Giesy.)

Q. Well, who particularly or specifically did you ever talk to about the cleaning up?

A. I have talked to all the men. That's one thing I would take upon my own self. I've talked to all the men about keeping their own units and their own areas clean, and it has not been done to our satisfaction.

Q. Did you ever advise any of the employees that they were not keeping their area clean?

A. Yes, sir.

Q. Now, who?

A. I would go right down the list, every employee that we have [112] there.

Q. Did you ever tell Mr. Jones?

A. Yes, I've talked to Mr. Jones to do sweeping and certain clean-up.

Q. Mr. Howe? A. Yes.

Q. Mr. Turner? A. Yes.

Q. Mr. Gann? Mr. Cook? A. Yes.

Q. Cantrell, Sr., and Jr.? A. Yes.

Q. Simons?

A. Not Cantrell, Jr. He's been on the truck most of the time.

Q. Mintonye is on the truck?

A. On the truck.

Q. Tom Cook? A. Yes.

Q. Frank and Don Harrington? A. Yes.

Q. And it's been rather general?

A. Yes. [113]

* * * * *

Q. By the way, Mr. Giesy, how does your pay

(Testimony of Wayne R. Giesy.)

compare now to what it did on October 30th, 1953?

A. We pay the boys \$1.50 an hour.

Q. And what were you paying them then?

A. \$1.20 an hour.

Q. I see. So, you stopped your operation on October 30, 1953, because of economic reasons, but you're now paying them 30 cents an hour more?

A. We don't pay the amount of overtime, Mr. Bailey. We hold it to 40 hours a week.

Q. Have you paid any overtime since October 30th, 1953?

A. The minimum that's been required. I stated for the record some time during the day that occasionally we had a truck driver out that could not get back in at a particular time, and we——

Q. Is it only truck drivers that go over 40 hours?

A. I think so.

Q. You are pretty well aware of what the operation as a whole is?

A. Yes, I would say that it's certainly only on the rarest occasion that it wouldn't be because of the truck that there was overtime paid.

Q. How much would you say you've increased the salaries of your salaried employees since that time?

A. Approximately \$10 to \$15 per month. [117]

* * * * *

Q. Have you ever discussed with Mr. Cantrell about re-employment there at your operation?

A. Nothing further than the day he called on Saturday, that we were in a discussion, and I think

(Testimony of Wayne R. Giesy.)

he came in on Monday, and, during that discussion, without knowing just exactly what the word exchanges were, he came back and said he was sorry for some of the things that he had said because he had gotten mad. I can't say what they were. I don't remember. [119]

* * * * *

Q. You've never offered him a job back there, have you? A. No, sir, I have not.

Q. And he's been a skilled man, I think, from the point of your operation, hasn't he? What was his job there? A. He was a cleaning man.

Q. And you now have Mr. Simons on that job, have you not?

A. No, sir, I have no one on the job.

Q. Who did you employ to go on that job?

A. When we terminated our operation on October 30th, we had less amounts of grain yet to clean than we ever had entering [120] into the winter in both operations.

Q. Have you done any cleaning since October?

A. We have done some cleaning since October.

Q. And who has been doing that?

A. We have done vetch cleaning, some of it, and some grain cleaning at Monroe, and Frank Harrington did that.

Q. Frank Harrington?

A. He was employed to do that.

Q. I see. Was there anything wrong with Mr. Cantrell's work?

A. Mr. Cantrell operated the other side of the

(Testimony of Wayne R. Giesy.)

unit which we haven't opened up to date.

Q. It hasn't operated at all then since October 30th?

A. I would say not over five hours.

Q. The total time in that period?

A. Total time that we have had any employee—
of our employees on it. [121]

* * * * *

Q. Have you ever offered Mr. Sams his job back?
A. No, sir.

Q. Was there anything wrong with his work?

A. Yes, sir.

Q. On what occasion did you tell him about that?

A. I have one of my cleaning records available with me today to show the difference in the quality of the work, if you desire to look at it.

Q. That isn't an answer to my question. Did you prior to October 30th tell Mr. Sams of any dereliction in his work at the operation?

A. Yes, I brought it to his attention during the harvest time.

Q. Do you recall the date?

A. Oh, I would say along in the middle of harvest.

Q. Was anybody else present?

A. Yes, Mr. Crockett was present.

Q. Mr. Crockett was present?
A. Yes.

Q. And what did you tell Mr. Sams?

A. Well, I attempted to instruct him as to how to take rat-tail fescue out of common rye grass.

Q. Well, go on.

(Testimony of Wayne R. Giesy.)

A. And the cleaning record since that time and subsequent seed analyst reports haven't substantiated the fact that he took the correction. [122]

Q. Has it substantiated the fact—it's strictly foreign to me, Mr. Giesy—I don't know this rat-tail problem you're talking about from a locomotive going down the street——

A. Well, I will say this to qualify it: It is very possible to clean it out so that it is satisfactory to sell the seed for the farmer, and, when a poor cleaning job is done, then it means a reduction in the price for the seed to the grower that brings the seed to us, and there isn't a better way to defeat your purpose as a seed cleaner than to do a poor cleaning job, and, if you do enough of them, you can cancel your business because they won't bring it back.

Now, that is the justification from our decision there.

Q. You made that report then to Mr. Sams. You don't recall the date, but some time during harvest?

A. Some time during the harvest, I went to the cleaner and told him what was wrong with the particular lot of seed that he was working on at that time, and I happen to know enough about cleaning how to set that particular machine.

* * * * *

Cross Examination

Q. (By Mr. Masters): Mr. Giesy, we have discussed various classifications of employees, including that of mixer and grinder, [123] and that of a cleanerman.

(Testimony of Wayne R. Giesy.)

Would you explain the difference between the cleaning operation, and the mixing and grinding operation?

A. The cleaning operation is seed and grain that is brought into the mill that is to be reprocessed and put in 100 pound bags or parcels, that is suitable to sell either in the wholesale channels or retail, and the difference between that and our mixing and grinding operations are that at certain periods during the season we can completely deplete the quantities of seed and grain to be cleaned and put into a market shape, whereas the grinding of feed will continue throughout the season.

Q. Well, then, the cleaning operation has to do with seeds?

A. Cleaning operation has to do with seeds, and it can be seasonal.

Q. Mixing and grinding has to do with feeds?

A. That's right.

Q. In your cost analysis, do you isolate—do you and can you isolate the cleaning operation from the mixing and grinding operation?

A. That isolation would be done at the Forest Grove office.

Q. Is such a cost breakdown made?

A. The only cost breakdown that is submitted to me is my overall figures on what mill earnings are, which would include the amounts earned by cleaning, and grinding and mixing. They would [124] be brought into one total for myself.

Q. Have you since October 30th purchased a

(Testimony of Wayne R. Giesy.)

cleaning machine that results in a reduction of your labor force?

A. We haven't purchased that since October 30th. However, we purchased it during the earlier part of the year, and it has brought about the condition where we have handled some of the grains more rapidly than we did prior. It used to necessitate the use of small cleaners, where the large scalper takes care of it today. It would change the amount of man hours we would have to put on a particular product.

Q. Has your operation since October 30th changed in respect to the proportionate amount of cleaning, seed cleaning, and your mixing and feeds?

A. We had—as I stated a moment ago, we had very little seed yet on hand to reclean and put into a market shape, where, with the mixing and grinding, we have developed it to a little better extent along the wholesale lines and into better marketing areas.

Q. Are you doing more mixing and grinding in relation to cleaning than you were before?

A. Yes, we are.

Q. That results in less sales of seed?

A. That is right.

Q. In other words then, your operation has changed since October 30th in that you're now selling more feed and less seed?

A. That is right. I might add to that that we had such a [125] small quantity to process that we wouldn't have had any substantial quantity during

(Testimony of Wayne R. Giesy.)

the winter months to work on. So, it automatically crossed off the seed cleaning operation.

* * * * *

Q. Mr. Crockett was your manager in Monroe?

A. At Corvallis. [126]

Q. Corvallis, and where is Mr. Crockett?

A. He has since deceased.

Q. The person that you had the conversation with on October—you say you talked to Mr. Mumford on October 30th? A. Yes.

Q. That was the day that your employees were discharged? A. Yes.

Q. Since October 30th, has he ever made a statement to you that he did not tell you about any union activity at that time?

A. Yes. Some few days after the lay-off, he came in to the office and made mention that he had never said anything to me regarding any union activities, and he said that in front of witnesses at the time.

Q. Did he later make a different statement than that?

A. A few days later, as I recall, he changed his conversation and said that he had told me.

Q. Would you state how your operation was changed after October 30th, and what respects of your operation changed?

A. We do not do as much retailing of material, or even wholesaling of material that necessitates putting it into 200 pound bags. When you do that, it causes the use of a great deal more machinery and labor. We have large scalping equipment, and we're

(Testimony of Wayne R. Giesy.)

able to put the material into proper condition for selling in 50 ton or more or less bulk box car loads of bulk grain, which automatically makes it more reasonable to handle. [127]

Q. What did Mr. Loomis tell you on October 30th that caused your decision to change your method of operation?

A. Mr. Loomis told me, as of that date, we'd shown a loss for the period from our inventory or our fiscal year close until we took our inventory on September 30th, and it would necessitate some drastic changes.

Q. What was the change—did he mention where the change should be made? In other words, what operation?

A. The only mentions that he made was our cost operations of mill earnings against what our sales of ton volume was.

Q. Your mill earnings, does that refer to the cleaning operation?

A. That refers to the cleaning operation, the earning power of those cleaners.

Q. And that seed that you cleaned at a certain charge to the farmer?

A. To the farmer, and to date it hadn't been sufficient to offset the expenses that were charged against it.

Q. Then at that time you decided to terminate your labor force until you could determine an efficient way to operate?

A. That is actually what took place.

(Testimony of Wayne R. Giesy.)

Q. And since that time, have you made various changes to try to find an efficient operation?

A. For one example, we have operated our mixing crews on a day and a night basis, which enables the production, I would say, of [128] approximately once and a half, rather than working two men together, which gives us more economical production.

In our sales, we have restricted our sales to more cash sales and do less credit business, which doesn't necessitate the amount of 100 pound sacks prepared for sale.

Q. Trading on a cash, rather than credit basis, reduced the volume of sales?

A. Yes, very materially. Only the other day, we had to unload a \$400 order of seed and fertilizer due to the fact that the man didn't have the cash to pay for it, and he had it on his truck before he made arrangements to take it.

Q. When you speak of two men on the machine, do you mean that prior to October 30th you had two men working the day shift on the same machine?

A. On the same machine.

Q. Now, you have one working on one shift, and one another shift? A. And one another.

Q. You find that's more efficient?

A. We find it has been more efficient, and it gives us more production.

Q. You have testified that you rehired some of the people that you laid off. I believe the Har-

(Testimony of Wayne R. Giesy.)

ringtons were a couple that you rehired, and I'm talking now of some that you rehired, then later fired again. [129]

A. Well, in that particular instance, we hired those boys to try to operate the cleaning facilities of our operation and keep the plant in an orderly fashion. As far as operating the machinery was concerned, they are capable of doing that, but they did not keep the plant in an orderly fashion.

Q. That experiment then of rehiring them and try to work it out, that failed?

A. That failed. So, we discontinued that, and we discontinued all phases of what might have caused that, including taking the foreman from one plant and reducing him from foreman and making him a cleanerman, which he will remain as cleanerman. [130]

* * * * *

CLAUDE SHAFFER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examinaton

Q. (By Mr. McIntyre): Mr. Shaffer, would you state your full name, please?

A. Claude Shaffer.

Q. And your address, sir? [135]

A. Labor Temple, Portland, Oregon.

Q. And, Mr. Shaffer, where are you employed?

(Testimony of Claude Shaffer.)

A. I'm employed by the American Federation of Labor.

Q. And in what capacity are you employed?

A. As an organizer. [136]

* * * * *

Q. During the time that—oh, did you make any visit with Mr. Stevens at the Monroe Feed Store in November of 1953?

A. On Monday, November 2nd, yes.

Q. And who did you go there with?

A. I went there with Mr. Stevens.

Q. And did you—where did you go?

A. We went to the Monroe Feed and Seed, and presumably to what was the office.

Q. And it's located in what city?

A. In Monroe, Oregon.

Q. And who all was in the office when you went in?

A. Well, we didn't actually get into the office. There's a little—I guess it's an alleyway. It's in between there, and we met Mr. Giesy there.

Q. Mr. Giesy? A. Yes.

Q. And was there anyone else in the room at the time? A. No.

Q. Did you have any conversation at that time with Mr. Giesy? A. Yes.

Q. How long did the conversation take place? How long did it [137] last?

A. Oh, I would say 10 or 15 minutes.

Q. Would you repeat now what that conversa-

(Testimony of Claude Shaffer.)

tion was? Who started it? What was said? Who said what?

A. Well, I think we started it. Our purpose was to notify Mr. Giesy that we represented a majority of his employees and to ask him to name a time and place for—to negotiate a contract covering their working conditions.

Q. Now, did you tell him that? A. Yes.

Q. Who told it?

A. I would say we both did.

Q. Well, just what was said, and then what was the answer?

A. Well, as I previously stated, we told him we represented a majority of his employees for collective bargaining, and we'd like to make arrangements for a time and place to negotiate an agreement.

Q. Then what did Mr. Giesy say?

A. Mr. Giesy told us that as of the previous Friday night he had no employees, and, therefore, we had no problem.

Q. And what else was said?

A. Well, then, we asked him who his attorneys were, and he told us it was Governor Patterson and associates.

Q. And then what did you tell him? Was there anything else to it? [138]

A. That was the main part of the conversation.

Q. Well, when you first went in there, was it necessary for you to advise Mr. Giesy who you were?

(Testimony of Claude Shaffer.)

A. I do not know that, but we did.

Q. And that was what the conversation was?

A. Yes.

* * * * *

Cross Examination

Q. (By Mr. Masters): Did you say that on November 2nd you knew the employees had been laid off the Friday before? A. Yes. [139]

* * * * *

AUSTIN LEE STEVENS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Mr. Stevens, would you state your full name, please?

A. Austin Lee Stevens.

Q. And your address, sir?

A. 310 Southwest Columbia Street, Portland, Oregon.

Q. And where are you employed, Mr. Stevens?

A. American Federation of Grain Millers, Local 61.

Q. In what capacity are you employed?

A. Executive Secretary.

Q. In your job, just what are the duties of your job?

A. Well, it's dues collections, organizing, processing grievances, doing negotiations.

(Testimony of Austin Lee Stevens.)

Q. The general duties of——

A. Business Agent.

Q. Business Agent? [141]

A. That's right.

Q. In your duties, do you cover the area of Monroe and Corvallis, Oregon?

A. We are chartered to go as far south as Eugene.

Q. Now, any time in 1953, did you have occasion to visit Monroe or Corvallis, Oregon, for the purpose of organizing the——

A. We did.

Q. ——the Monroe Feed employees?

A. We did.

Q. When did you first undertake that organization?

A. We received inquiries from Monroe—well, when we first tried it? [142]

* * * * *

Q. (By Mr. McIntyre): Who first contacted you? A. Webster Sams.

Q. As a result of him contacting you, did you have a meeting? A. Yes.

Q. Where was the meeting held?

A. At Webster Sams' house.

Q. And is that in Bellfountain?

A. That's in Bellfountain.

Q. What day was it held?

A. October the 27th.

Q. What time of day? A. 8 o'clock.

Q. Who attended? [143]

(Testimony of Austin Lee Stevens.)

A. There were six employees, Ralph Jones, Frank Harrison, Webster Sams, Jess Howe, Ray Joyner, and Kenneth Mumford.

Q. Now, did you have them sign authorization cards for your union at that time? A. I did.

Q. Did all of them sign? A. Yes.

Q. All that were attending? A. Right.

Q. Were any steps taken to have the remaining employees sign those cards?

A. There was.

Q. And what steps were taken?

A. We sent cards back by the employees.

Q. By what employees?

A. It was either Ralph Jones or Jess Howe took one or two back to Corvallis, and Frank Harrington took the balance to Monroe.

Q. And were those cards then executed and returned to you? A. They were.

Q. And as of October 28th, 1953, at 4 o'clock in the afternoon, how many of the company's employees did you have signed up in the union?

A. Twelve.

Q. Twelve, and how many employees were there at that time? [144]

A. Thirteen—thirteen within our understanding. One of them, we understood, was in the hospital and we were unable to contact him.

Q. And that was 12 employees of what has been set out in the complaint as an appropriate unit for collective bargaining? A. That is right.

Q. As a result of having these cards signed on

(Testimony of Austin Lee Stevens.)

October 28th, what was the next thing that you heard about the—or that you learned about the status of the employees?

A. It was either late Friday night of October the 30th or early Saturday morning, I received a call from—I think it was Webster Sams' house—now, whether there was more than one there that morning, I don't know, but I received a call that they had all been discharged Friday night.

Q. And what steps did you take then?

A. Previously—well, at that time—well, immediately on Monday morning, I went before the National Labor Relations Board and filed an unfair labor charge, and immediately then drove from there—from Portland to Monroe, to Webster Sams' house, and met with the employees, and then went to see Mr. Giesy at Monroe.

Q. Now, who was with you when you went over to see Mr. Giesy? A. Claude Shaffer.

Q. And what time of day was that?

A. It was in the afternoon, along in the [145] middle of the afternoon.

Q. And where did it take place?

A. Well, where you go through on the front porch and up the stairway, there's an office on one side that's got—I don't know whether there's a door on it or not, but there's a partition and a door coming in—I guess it would be the north side—and there's an alleyway about so wide, and a counter on one side with a doorway in it, and Mr. Giesy was standing in the doorway. I was standing on

(Testimony of Austin Lee Stevens.)

one side of the counter. Mr. Shaffer was on the other.

Q. And was there any conversation?

A. Yes.

Q. And what was that conversation?

A. I asked Mr. — I told Mr. Giesy that we represented a majority of his people for the purpose of negotiating a contract and wanted to set a time and place to sit down and talk.

Q. And what did Mr. Giesy say?

A. He said, "As of Friday night, I have no employees. So we have no problem."

Q. Was anything else said?

A. Yes, we said, "Well, do you realize that's an unfair labor charge to discharge employees at this time?" And he said, "Well, I didn't do it for that. I did it because I got orders from the auditors" or something, and that ended that. [146]

* * * * *

Q. Now, from October 28th at 4 o'clock, at the time that you had all the employees signed up, with the exception of the one who was in the hospital, to have your union bargain for them, has any of those employees ever advised you that they wished to withdraw?

A. Not me personally, no. [147]

* * * * *

Cross Examination

Q. (By Mr. Masters): And that meeting of October 27th was the first organizational meeting you held down here in '53?

(Testimony of Austin Lee Stevens.)

A. That is right. [150]

* * * * *

Q. And you talked to Harrington on the 2nd?

A. That's right.

* * * * *

Q. Then you said you talked to Mr. Sams on the telephone? A. That's correct.

* * * * *

Q. And he told you about the discharge?

A. That was either Friday night—late Friday night or early Saturday.

Q. Will you tell exactly what the conversation was as well as you remember it?

A. Well, the main conversation was that he said, "Well, we all [151] got laid off at quitting time tonight" or Friday night, and I says, "For what reason? What did they give you?"

He says, "Oh, just something about economics."

* * * * *

KENNETH MELVIN MUMFORD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Would you state your full name, please?

A. Kenneth Melvin Mumford.

Q. And what is your address, sir?

A. Monroe, Box 26.

(Testimony of Kenneth Melvin Mumford.)

Q. Have you been employed by Monroe Feed Store? A. Yes.

Q. When were you first employed there? [153]

A. September 6th, 1950—no ———

Trial Examiner: What is the answer?

The Witness: '49.

Q. (By Mr. McIntrye): '49, September?

A. Yes.

Q. And in what location were you employed?

A. Well, the first that I done was worked on the cleaner.

Q. Well, were you employed in Corvallis or Monroe? A. Monroe. [154]

* * * * *

Q. Were you employed by Monroe Feed Store in October of 1953? A. Yes, I was.

Q. And were you employed on October 30th of 1953? A. Yes.

Q. At that time, was your employment terminated on October 30th, 1953? A. Yes.

Q. Was your employment terminated?

A. I was laid off.

Q. And who laid you off?

A. Well, Giesy, I guess.

Q. He was the one that gave you the check?

A. Yes.

Q. Now, are you a member of any labor organization? A. Yes.

Q. What organization is that?

A. A. F. of L.

Q. Is that the Grain Millers? [156]

(Testimony of Kenneth Melvin Mumford.)

A. Yes.

Q. The union in this case? A. Yes.

Q. And when did you join?

A. The 27th of October.

Q. And where were you when you joined that?

A. Webster Sams' house.

Q. Have you continued as a member of the union since that time? A. Yes.

Q. Now, do you recall the afternoon of the day you were laid off? A. Well —

Q. First of all, do you recall the afternoon of the day you were laid off? A. Yes.

Q. And that afternoon did you have any conversation with Mr. Giesy? A. Yeah.

Q. Where did that conversation take place?

A. In the office.

Q. And who was present? A. Giesy.

Q. You and Mr. Giesy? A. Yes.

Q. Was anyone else there? [157]

A. Not that I recall.

Q. And what time of day was it?

A. Oh, it was about 1 o'clock.

Q. About 1 o'clock in the afternoon?

A. Mum-hmm.

Q. And would you repeat what the conversation was that you had with Mr. Giesy at that time? First of all, what were you doing in the office?

A. Well, I went in after some feed for chickens I had up at the house, and Giesy, he asked me who all was out at the union.

Q. Who all was where?

(Testimony of Kenneth Melvin Mumford.)

A. Who all was out at the union meeting, and he—I said, yes, that I was there, and that we'd all signed union cards.

Q. Did he say anything else?

A. He said, "Is that what the men want?" and I said, "I guess so", and that was——

Q. Did he say anything else then?

A. No, I don't believe he did.

Q. Now, specifically, what was it that was said? You went in there to get some seed? A. Feed.

Q. Feed? A. Mum-hmm.

Q. And who brought up the conversation of the union?

A. Well, Giesy spoke first. I was purchasing a sack of feed, [158] and he asked me what—while I was getting the sack of feed about it.

Q. Yes, go ahead. What was it that he said?

A. Well, he asked me who all was out to the meeting.

Q. Yes.

A. And I said that I was, and that we'd all signed union cards.

Q. What else? Anything else said?

A. Well, I said that it didn't make any difference, that we'd all signed.

Q. Did he say anything then?

A. Well, that's when he said, "Is that what the boys want?" and I said, "I guess so," and I went out. [159]

(Testimony of Kenneth Melvin Mumford.)

* * * * *

Q. Now, has Mr. Giesy ever notified you to come back to work since October 30th of 1953?

A. No, he hasn't.

Q. Did he ever give you any reason—did he give any reason to you why you were not being hired back? A. No.

Q. Now, during the time you worked there under Mr. Turner or Mr. Giesy, did either one of those men ever tell you that your work was unsatisfactory? A. Not that I can recall.

Q. So then, since October 30th of 1953, you have not worked for Monroe Feed? A. No.

Q. Have you made any attempts to go back to work with them?

A. Well, I was in one time, and I asked him—I asked Mr. Giesy if there was any work available, that I could do.

Q. And when was that?

A. Well, I think that was about two or three weeks later. [160]

* * * * *

Cross Examination

Q. (By Mr. Masters): Where are you working now, Mr. Mumford? A. I'm not working.

Q. When you went back and asked for work again, did Mr. Giesy tell you that he didn't have any work available at that time?

A. I think he did.

Q. And did you talk to him about the unfair labor charge at that time?

(Testimony of Kenneth Melvin Mumford.)

A. Not that I can—not that I can recall.

Q. It was earlier that you talked to him about that?

A. It was the day I was laid off, that is, I mentioned before there.

Q. Well, you mentioned something about the size of the thing you signed, the length of it, I believe, in your conversation with Mr. Giesy. Do you recall that?

A. You mean the statement that I signed?

Q. Yes.

A. No, I don't believe—I don't believe I did.

Q. Did Mr. Giesy ever ask you if you signed a charge against him? A. Yes.

Q. And you told him you had? A. Yes.

Q. And did you tell him that anyone else had, in addition to you? [162] A. No.

Q. What was it that you signed? Do you recall?

A. It was my statement.

Q. Who wrote the statement for you?

A. I forget what his name is.

Q. Do you recall what it said?

A. Well, it read as what I just testified to, with the union lawyer there.

Q. Pardon?

A. It read as I testified to the union lawyer there.

Q. It read as you testified that what? I couldn't hear.

A. To the union—labor—or the official over there.

(Testimony of Kenneth Melvin Mumford.)

Q. Who? Which official?

A. Oh, I forget—yeah—I don't know his name.

Q. Now, you said that you talked about this charge, but it wasn't when you came in to look for work; it was another time. Is that correct?

A. It might have been, yes.

Q. It might have been another time, or it might have been when you asked for a job?

A. It wasn't at the time I asked for the work.

Q. It was a different time? A. Yeah.

Q. So, you saw him on October 30th, and you saw him when you asked for your job back, and then you saw him at some time in [163] between then?

A. No.

Q. When was it, do you remember?

A. It must have been later.

Q. Why do you say it must have been later?

A. He come up to my house once and was talking to me.

Q. Pardon?

A. He come up to my house once and was talking to me once. I don't know whether there was any mention about it then or not.

Q. When was that?

A. Well, let's see. That was in November, I believe.

Q. What did he talk to you about then?

A. Well, he—I don't recall much about that just offhand.

Q. Did you ever sign a statement, an affidavit, or anything in connection with this case?

(Testimony of Kenneth Melvin Mumford.)

Mr. McIntyre: Objection.

Trial Examiner: Well, what is the basis of the objection?

Mr. McIntyre: I don't see the materiality. He's here to testify as to what took place.

Trial Examiner: All right, I'll sustain the objection—no, I'm not. I'm going to overrule the objection. You may answer that. Did you sign a statement?

The Witness: No, I didn't.

Q. (By Mr. Masters): Well, Mr. Mumford, you said you signed something. What was it, do you know? You said Mr. Stevens—— [164]

A. Other than the one that I signed there that I testified on.

Q. You said that was something that Mr. Stevens gave you, is that correct?

A. No, it wasn't Stevens.

Q. Who gave it to you then, the thing you signed?

A. It was——

Mr. McIntyre: Was it Mr. Hedges?

The Witness: Hedges.

Mr. McIntyre: Let the record show that Mr. Hedges is a field examiner for the National Labor Relations Board.

Q. (By Mr. Masters): Was that down here in Monroe or in Portland?

A. Yeah, that was in my house.

Q. You say—what date was it that you signed that that Mr. Hedges gave you?

(Testimony of Kenneth Melvin Mumford.)

A. I wouldn't know offhand.

Q. Who wrote it out? A. Mr. Hedges.

Q. Now, you said it was a charge, and it wasn't a statement. Do you know what it was? I mean you say it was what you testified to here. In other words, it was testimony like you repeated here?

A. I suppose it would be a statement against the charges.

Mr. McIntyre: Mr. Mumford, you're a little nervous, aren't you? Have you ever had occasion to testify in a court before? [165]

The Witness: No, I haven't.

Mr. Masters: Mr. Examiner, I wasn't through. I wonder if you have that charge or that statement that he signed here.

Q. (By Mr. Masters): Are you certain of the dates, Mr. Mumford, that you talked to Mr. Giesy about getting hired again? A. Well, I——

Q. You testified it was two or three weeks later.

A. No.

Q. And I believe you said in another statement that it was two days later. Are you certain of that date that you talked to Mr. Giesy about your job?

A. No, I'm not.

Q. It could have been the following Wednesday after your discharge?

A. Well, it could have been. I don't just recall what day it was.

Q. Isn't it possible that that was the Wednesday you told him about signing the cards, instead of a Friday? A. No.

(Testimony of Kenneth Melvin Mumford.)

Q. Have you signed more than one statement?

A. No.

Q. Didn't you sign a second statement along with all the rest of the employees, a one page statement?

A. Yeah, I believe I did sign when I went out to Sams' place at a union meeting. I don't recall what it was about. [166]

Q. I didn't hear what you said this time, Mr. Mumford. Did you say that you didn't know what the statement was you signed, the one you last mentioned?

A. I don't recall what it was about at this particular time. [167]

* * * * *

Recross Examination

Q. (By Mr. Masters): That time when you went back to ask Mr. Giesy for work, wasn't that the Wednesday following your discharge, rather than two or three weeks later?

A. Well, I think it was.

* * * * *

WEBSTER SAMS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Mr. Sams, would you state your full name for the record, please?

A. Webster Sams.

Q. And, Mr. Sams, where do you live?

(Testimony of Webster Sams.)

A. Bellfountain, Oregon.

Q. How long have you resided at that address?

A. Since the 16th of July of '52. [170]

Q. Were you ever employed by the Monroe Seed Company—Feed Company?

A. From that date until October of '53.

Q. Which location did you work in?

A. I worked at both of them. I hired out at Corvallis plant.

Q. You hired out at the Corvallis plant?

A. That's right.

Q. How long did you work there?

A. Well, I worked there till after Christmas, and then I went up to Monroe.

Q. After Christmas of—— A. 1952.

Q. 1952? A. Yes.

Q. And then went up to Monroe? A. Yes.

Q. How long after Christmas?

A. Oh, it was after New Year's, I believe.

Q. And did you work continuously then up till the time of your termination in October?

A. No. I came back to Corvallis in the fall when the harvest started.

Q. At harvest? A. Yes.

Q. And how long did you remain back in Corvallis? [171] A. Until we were laid off.

Q. And you were laid off on October 30th of 1953? A. October 30th, yes. [172]

* * * * *

Q. You've heard all this testimony, haven't you, here today? A. Yes.

(Testimony of Webster Sams.)

Q. Was there a meeting held at your house?

A. Yes.

Q. When was it held?

A. It was held the 28th of October.

Q. And what was the day? Do you recall the day of the week?

A. It was Tuesday.

Q. Tuesday?

A. Yes.

Q. And do you recall who attended the meeting?

A. Yes.

Q. Were they employees of the Monroe Feed Company?

A. Yes, they was.

Q. Who all attended?

A. Well, there was myself, Kenneth Mumford, Frank Harrington, and Jess Howe, and Jones.

Q. And did Mr. Stevens of the Grain Millers address you at that time?

A. Yes. [173]

Q. Did all of you sign authorization cards?

A. That's right.

Q. And were arrangements made to have the other employees sign cards?

A. That's right.

Q. Now, Mr. Sams, after this meeting in your house, let's see—then you were terminated?

A. That's right.

Q. Who terminated you?

A. Crockett. * * * * * [174]

Q. And did you meet Mr. Crockett?

A. Yes, sir.

Q. Have any conversation with him?

A. Yes.

Q. And what did you ask him? What was the conversation?

(Testimony of Webster Sams.)

A. I asked him what was the reason I got laid off. He said he didn't know. He supposed it was just due to the overhead, and that was his orders, and he just couldn't help it. [175]

* * * * *

Q. About a month or better after you were laid off?

A. To the best of my recollection, yes.

Q. Did Mr. Giesy come out to your house?

A. Yes. * * * * *

Q. And did Mr. Giesy advise you what his business was? Did he talk to you?

A. Oh, he talked to me some, but he said his books was audited and the bank notified him that he was behind and just to shut her down. [176]

* * * * *

Q. Now, up till that time, had any of the supervisors, either at Corvallis or at Monroe, ever told you that your work was dissatisfactory?

A. Not a word, no, sir.

Q. Did they ever tell you that your work was satisfactory? A. Yes.

* * * * *

Q. Now, how long have you been cleaning seed?

A. I've got 10 years.

Q. Ten years experience at cleaning seed?

A. Yes.

Q. Then you had cleaned it at other locations, other than at [177] Monroe?

A. I worked just about seven years for Centen-

(Testimony of Webster Sams.)

nial, and I worked about a year and a half for Buchanan-Cellars. [178]

* * * * *

Q. Now, I believe it was testified that Mr.—no—strike that.

After the meeting in your house, or any time immediately prior to the meeting in your office, did you have any conversation with Mr. David Crockett about that meeting?

A. Yes, the next morning.

Q. The following morning?

A. The following morning.

Q. And where was that conversation?

A. In the office.

Q. In the office? A. Yeah.

Q. How did you happen to be in the office? [181]

A. Well, I was called in.

Q. You were called in?

A. I was called in.

Q. Who called you in? A. Dave.

Q. Mr. Crockett? A. Crockett.

Q. And when you went in, did he advise you why he notified you to come in?

A. No. He just kind of—Mr. Crockett was kind of a humorous feller, and he said to me, he said he heard of the meeting at Bellfountain last night, and I said, “Oh, is that right?” And he said, “Yes”, he said he’d heard it at the depot, and I just figured he was kind of throwing bricks at me, and he was talking along there, and he said, “Did you go?” and I said, “No, I didn’t go.”

(Testimony of Webster Sams.)

Well, he said, "Did you hear of the meeting?" And I said, "Well, I didn't hear of an outside meeting, but we had a meeting in our place, at my place." He said, "Did you have a union in there?" And I said, "Yes, we had a union in there." [182]

* * * * *

Q. (By Mr. Bailey): I believe you stated, Mr. Sams, that this meeting was held on the 28th, but it was on a Tuesday? A. Yeah.

Q. Now, do you recall, if I were to advise you, that the 27th of October was a Tuesday, would that have been the date, or would it have been Wednesday, the 28th, on which this meeting was held at your place?

A. I believe you're correct.

Q. Which would it be?

A. Tuesday would be before Wednesday. Wednesday would be the 28th.

Q. You're sure it would have been on the 27th?

A. Yes. [183]

* * * * *

ALEC JOHNSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Would you state your full name for the record?

A. Alec Johnson.

(Testimony of Alec Johnson.)

Q. Please speak right up so they can hear you, Mr. Johnson. What is your address?

A. Monroe, Box 62.

Q. Were you ever employed by Monroe Feed Store?

A. Yes, sir.

Q. When were you first employed there?

A. Let's see. I believe it was along towards the last of July or the first of August.

Q. Of 1953?

A. Yes.

Q. And how long did you continue in their employment?

A. Up to the 30th of October. [194]

* * * * *

Q. During the time that you were employed at Monroe Feed Store, were you a member of any union?

A. I joined the union — this union — about the 28th day of October.

Q. You're referring to "this union" as the Grain Millers that is involved in this case?

A. Yes.

Q. Now, are you still a member?

A. Yes.

Q. You remained a member from the time you joined until now?

A. Yes, sir. [195]

* * * * *

Q. Now, you didn't attend a meeting at Webster Sams' house?

A. No, sir.

Q. But you signed a card the following day?

A. Yes, sir.

Q. Who gave you the card?

A. Frank.

Q. Frank who?

A. Harrington.

(Testimony of Alec Johnson.)

Q. One of the employees of the company?

A. Correct.

Q. Now, was your job, during the time that you were there, was your job a permanent full time job?

A. Well, when I was hauling, they wouldn't say would I stay or do harvest, but about a week before I was laid off I asked Claude Turner.

Q. He was the foreman?

A. Yes, and he told me they'd keep me on steady.

Q. That was the week before you were laid off?

A. I was laid off after.

Q. Now, did you ever have any conversation with any of the management relative to unions?

A. Not with Mr. Giesy, no.

Q. Well, did you ever have any with Mr. Turner?

A. Yeah, one night. Well, I'd say it was about a month or a [196] month and a half before I was laid off.

Q. Where did you have that conversation?

A. At Junction—Safeway, Junction—Safeway Store.

Q. Junction City? A. Mm-hmm.

Q. What time of night was it?

A. Well, I'd say it was around 7:00 or 7:30.

Q. What was the conversation?

A. Well, I asked Mr. Turner—I told him, I said, "What we need over at the mill is a union."

Q. What did he say?

A. He said, no, he couldn't work the hours he

(Testimony of Alec Johnson.)

was working and make the money he was making if we had a union.

Q. What did you say then?

A. I told him, well, I didn't see why. He said if Mr. Giesy would find it out, he'd can everyone who joined the union, the words he told me. [197]

* * * * *

FRANK HARRINGTON

a witness called by and on behalf of the Charging Party, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bailey): Would you give your name and address, please?

A. Frank Harrington, General Delivery, Monroe, Oregon.

Q. Now, were you an employee of the Monroe Feed Store in the past? A. I was.

Q. When were you first employed there?

A. Well, it was about in March of '52.

Q. And how long have you worked for them?

A. Well, it would be two years this coming March.

Q. What job did you have when you were first employed?

A. Well, I went to work there as a cleanerman.

Q. And did you keep that same job while you were working there?

A. Yes, that was my regular job. [201]

(Testimony of Frank Harrington.)

Q. Now, Mr. Harrington, you have been in this room during these sessions, have you not?

A. I have.

Q. Have you heard the reference made to a meeting at Webster Sams' house on October 27th?

A. That's right.

Q. 1953? A. Yes.

Q. Were you present at that meeting?

A. I was.

Q. Did you become a member of the union?

A. I did.

Q. When did you do that?

A. October 27th.

Q. Now, what union is that?

A. American Federation of Grain Millers, Local 61, A. F. of L.

Q. Now, subsequent to the meeting at Webster Sams' house on October 27th, did you do anything on behalf of the union?

A. You mean before?

Q. I mean after that meeting at Webster Sams' did you assist the union in any way?

A. I did.

Q. What did you do?

A. Well, I took agreement cards to the men that wasn't at the meeting that night. [202]

Q. What did you do with those cards?

A. On the 28th, I took them up to the mill, had everybody sign that hadn't signed.

Q. Did you get all the signatures of those who had not previously signed?

(Testimony of Frank Harrington.)

A. All except one. I think he was in the hospital at that time.

Q. And what plant was this?

A. I was at Monroe.

Q. Those were at the Monroe plant?

A. Yes.

Q. What did you do with those cards then afterwards?

A. Put them in an envelope and sent them to Mr. Stevens.

Q. When did you send those to Mr. Stevens?

A. I can't pinpoint the exact time, but it was between 1 o'clock and 3 o'clock when I mailed the envelope.

Q. And what day? A. On October 28th.

Q. Now, Mr. Harrington, between October 27th, the date of the meeting at Webster Sams' house, and October 30th, did you have any conversations whatsoever with any of the supervisors of the Monroe Feed Store? A. I did.

Q. Who did you talk to?

A. Claude Turner, the foreman. [203]

Q. Now, where did this conversation take place?

A. In the mill at Monroe.

Q. And do you recall the date?

A. It was October 30th.

Q. About what time, do you recall?

A. Well, I couldn't pinpoint the exact hour, but it was in the afternoon.

Q. You mean after lunch? A. After lunch.

(Testimony of Frank Harrington.)

Q. Was anybody else present, besides you and Mr. Turner?

A. No, no one else was there.

Q. You said this conversation took place in the mill. Can you pinpoint where it was, what place?

A. Yes, sir.

Q. Where?

A. At the south door, right by my cleaner.

Q. This was by your place of operation?

A. That's right.

Q. Do you recall the exact words of the discussion at that time?

A. I believe I can recall the exact words of that conversation, yes.

Q. Would you repeat those, please? What you said to Mr. Turner, and what he said to you, and so forth?

A. All right. He came back to the cleaner where I was, and [204] he said, "I see Dave Crockett's at the office", and I said, "What do you suppose he's there for?" He said, "Well, I only caught a little of it, but," he said, "I think someone is trying to get a union in the mill", and I said, "Well, what do you suppose will happen?"

He said, "Well, Wayne will just find out who started it, and he'll fire him." He said, "That's what happened the other time."

Q. Now, this is a statement made by Mr. Turner to you? A. That's right.

Q. Did you make any comment to that?

A. Well, no, I didn't make any comment to that.

(Testimony of Frank Harrington.)

He said, "Besides, it has to be 51 per cent before the union can do anything anyway", and I told him, well, I said, "We don't have to worry about that. We're 100 per cent, both mills."

* * * * *

Q. Were you laid off on October 30th, along with everybody else? A. I was.

Q. And was this—did this occasion happen about 6 o'clock? A. It did. [205]

Q. Where did this lay-off take place?

A. In the office of the Monroe Feed Store.

Q. Could you explain what happened there? Were any statements made to you at that time by Mr. Giesy when you were laid off as to the reason for the lay-off of that nature?

A. Yes, there was.

Q. What did he say?

A. He said his auditors had informed him that day that he was behind, and he was going to have to make some changes and he just had to lay us all off, and I asked him again, and he said, well, the outgo is more than his income was; therefore, he couldn't use us boys any longer.

Q. Now, after your lay-off of October 30th, did you again discuss employment with the company?

A. Yes.

Q. Who did you talk to?

A. I talked to Claude Turner.

Q. When was this?

A. I couldn't pinpoint the exact date.

Q. Approximately at what date?

(Testimony of Frank Harrington.)

A. Well, I'd say it was about three, maybe four weeks after I was laid off.

Q. And what was said there?

A. I asked when he thought Wayne would put us all back to work, and he said he didn't think that he would. He said he thought [206] that Wayne was going to start wholesale and retail of feed and seed and not clean any more seed.

Q. Now, were you subsequently rehired by the Monroe Feed Store? A. I was.

Q. When were you rehired?

A. About January the 8th, I think it was.

* * * * *

Q. After your employment of January 8th, Mr. Harrington, did you discuss the union at any time with Mr. Giesy or any other supervisor?

A. The union was brought into the conversation at one time.

Q. When was that?

A. Well, it was about February the 8th, to the best I can remember. [207]

* * * * *

Q. What was said, if you can recall the conversation—the conversation between yourself and Mr. Giesy?

A. I'll do my best. I went into the office, to the inner office, and asked Wayne if he would come out, I'd like to talk to him. He come out into the outer office——

Q. If I may stop you a moment, I think you said your brother, Don Harrington, was present?

(Testimony of Frank Harrington.)

A. Absolutely.

Q. Was there anybody else present?

A. I don't recall anyone else being present.

Q. All right. Now, then, Mr. Giesy came out to the outer office. What was said?

A. I asked Wayne why he was holding our checks and why he wouldn't give us our checks, the same as anybody else, and I also explained to him that we never had a chance to pay him before if he held our checks, but he always held them first, or that Maurie Beals had always held them first and asked for the money before we ever got the checks.

Q. Yes.

A. And he said that there had been a mistake, that he didn't tell Maurie Beals in those exact words. He told Maurie Beals, he said to tell Don and I to wait and see him. So, he asked me if I didn't think it was fair for us to pay some of our bills each week. I told him absolutely, yes, but I asked him, hadn't we been paying on them each week, and he said yes, but he would [210] like for us to pay a little bit more for the next two weeks, and, after the next two weeks, the third week that we could skip a week, and then after that we could resume our weekly payments, and we agreed to that, and I asked him if he'd go and get the books and see how much I owed him.

He said, "Yes", and he started back to get the books, and my brother, Don, said yes, he wanted him to get the books and figure out how much he owed him because he wanted to pay him off. Then he

(Testimony of Frank Harrington.)

could lay him off tomorrow if he wanted to, and Wayne was going after the books at that time and he whirled back around and said, "Now, listen, young man", and started shaking his finger under his face.

Mr. Giesy—my brother pushed his hand down and told him not to shake his finger in his face any more, and Wayne said, "I will if I want to", and Don said, "Step outside and you won't", and then Wayne said, "No, we don't want to have any kind of trouble like that", and Don asked him then if he thought he had done as much work in that mill as anybody had and worked as hard, and Wayne agreed with him.

So, Wayne said there's some of the men that hadn't done all that they could do there, and he said, "I'm going to have to put some of these men back to work, and I'm going to lose money by it, but," he said, "before I go union, I'll shoot myself right between the eyes." [211]

* * * * *

Q. Well, now, Mr. Harrington, you were in the court room yesterday when statements were made relative to the reasons for your lay-off—your and Don Harrington's discharge in March of this year.

Do you recall that the statement was made that you were laid off because you had taken so long to take inventory? A. Yes, sir. [212]

* * * * *

Q. Did you have any instructions relative to keeping the area around your operation clean?

(Testimony of Frank Harrington.)

A. Yes, we all knew to keep it clean.

Q. What kind of instructions were you given personally?

A. Well, I can't recall just exactly the words that was used, but we've all—or I myself at some or other, I can recall being told that we should keep the place clean. We all knew that. We didn't have to be told. [214]

* * * * *

DON HARRINGTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Would you state your full name, please? A. Don Harrington.

Q. And your address, sir?

A. Monroe, Oregon. [217]

Q. And have you ever been employed by Monroe Feed Store? A. Yes, sir, I have.

Q. When were you first employed?

A. July, '52.

* * * * *

Q. Now, during your employment at Monroe Feed Store, were you a member of any union?

A. Not until October 28th.

Q. October 28th? A. 1953.

Q. And what—then did you become a member of a union? [218]

(Testimony of Don Harrington.)

A. Yes, I signed a card.

Q. What union was that?

A. A. F. of L., Grain Millers Association.

Q. And that's the same local union that is involved in this proceeding? A. 61.

Q. And where did you join that?

A. At the feed store.

Q. The feed store. Was that the day after the meeting in——

A. It was the day after the meeting.

Q. Are you still a member? A. I am.

Q. Now, were you laid off on October 30th, 1953, with the other employees? A. I was.

Q. And at that time, did—who was it that laid you off? A. Mr. Giesy.

Q. And what reason did he give?

A. He said that his income was lower than his outgo—or his—yeah—and he had to lay us off until he could make other arrangements to produce more income.

Q. Now, were you ever re-employed by the company? A. Yes. [219]

* * * * *

Q. Now, did you hear the testimony of your brother here relative to the conversation on March the—I mean, on February 8th in Mr. Wayne Giesy's office? A. I did.

Q. Were you present? A. I was. [220]

* * * * *

Q. (By Mr. McIntyre): Would you repeat the

(Testimony of Don Harrington.)

conversation that you and your brother had with Mr. Giesy after he arrived back?

A. Well, he came into the outer office. My brother, Frank, asked him to, and Frank asked him what was the reason for not signing our checks. So, he said, well, there was a mistake on Maurie's part. He said that he didn't mean it like that. He said he just wanted to talk to us boys before he signed our checks, and said that he wanted to get us to pay more on our bills, and so Frank asked hadn't we been paying on our bill, and he said, yes, but, he said, he wanted a little bit more, and so he said, "Pay \$15 this week, and \$15 the next one or two proceeding weeks", and then we could resume back down to our [221] regular payments, and so we agreed to it.

Frank asked him to get the books. He said he wanted to check and see what he owed. I told him I wanted to get what I owed him too, that I wanted to figure up and pay him what I owed him, and then he could lay me off the next day if he was just working me for what I owed him.

Then Wayne turned back around and began to shake his finger in my face, and I told him not to be doing that, and he said he'd shake his finger in my face when he got ready to, and I told him to step outside, and he wouldn't do it any more. He says, "No, we don't want to have no trouble like that." Then he got his books and showed us where, if he was working us for what we owed him, that he would be working other fellows that owed him a lot more

(Testimony of Don Harrington.)

than what we owed him, and he said that we was good hands, and he said—I told him, I said, “Well, we have worked as hard here for you as any man you have or ever have had.”

He said, “I agree with you.” He said, “You have.” Then he says, “I’m going to have to put some men back to work here.” He says, “And when I do, I’m going to lose money by it, but,” he says, “before I go union, I’ll shoot myself between the eyes.”

* * * * *

Q. Now, have you ever, during the time that you were employed [222] there, did you ever have any instructions about keeping the area where you worked clean?

A. Yes; yes, we—I’ve had instructions.

Q. Who gave you those instructions?

A. Claude Turner. [223]

* * * * *

FLOYD CANTRELL, SR.

a witness called by and on behalf of the Charging Party, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bailey): Would you state your name and address, [226] please?

A. Floyd Cantrell, Junction City, Route 3.

Q. And have you been an employee of Monroe Feed Store? A. Yes.

(Testimony of Floyd Cantrell, Sr.)

Q. How long have you been employed there, or had been employed there?

A. Oh, I suppose I had been there for eight years, maybe a little better.

Q. Had you been there longer than any other employee of the company? A. Yes.

Q. What was your job there?

A. Well, when I first started to work for Wayne, I worked on the grinder, I guess, for six or seven months. Then he put me on the cleaner.

Q. And how long had you worked on the cleaner?

A. I run a cleaner ever since.

Q. That would have been about seven years you worked on the cleaner?

A. Yes, seven, or a little better. [227]

* * * * *

Q. Are you a member of any labor organization?

A. Well, I signed a union card the next day after they had the meeting out at Sams'.

* * * * *

Q. And have you continued to be a member of the union since that time? A. Yes. [228]

* * * * *

Q. Now, Mr. Cantrell, you were laid off along with all the other employees of the company, were you not? A. Yes. [229]

* * * * *

Q. Now, Mr. Cantrell, were you given any instructions to keep the area where you were working clear and free of debris?

(Testimony of Floyd Cantrell, Sr.)

A. Well, yes, Wayne had give us all instructions, you know, try to keep it clean the best we could.

* * * * *

Redirect Examination

Q. (By Mr. McIntyre): Did the management of the company ever tell you that you would not be reconsidered for employment, or considered for employment, because of your age?

A. No, never did.

* * * * *

FLOYD CANTRELL, JR.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * [234]

Q. (By Mr. McIntyre): Were you ever employed by Monroe Feed Store?

A. Yes, I was.

Q. Are you employed there now?

A. Yes, I am.

Q. When were you first employed there?

A. I started work in July, 1949. [235]

* * * * *

Q. During your employment at Monroe Feed, have you ever joined any union?

A. Yes, I did.

Q. What union was that?

(Testimony of Floyd Cantrell, Jr.)

A. American Federation of Grain Millers.

Q. When did you join that?

A. October 28th—27th or 28th.

* * * * *

Q. Now, were you laid off on October 30, 1953?

A. Yes, I was.

Q. With the other employees? A. Yes.

Q. And then when were you rehired?

A. About the 11th or 12th of November. [236]

* * * * *

RAY JOYNER

a witness called by and on behalf of the Charging Party, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bailey): Would you give your name and address, please?

A. Ray Joyner, Route 1, Monroe, Oregon.

Q. Have you ever been employed by Monroe Feed Store? A. Yes, sir.

Q. When did you first begin your employment?

A. I believe it was March in '52, March in '52.

Q. And what job did you have at that time?

A. It was just general—just odd jobs.

Q. General utility work, is that it?

A. Huh?

Q. General utility work? A. That's right.

Q. You were laid off with all the other employees of the company, were you, right at the same time?

(Testimony of Ray Joyner.)

A. Yes. [241]

Q. Were you a member of the—do you belong to a union? A. That's right.

Q. What union is that?

A. American Federation of Grain Millers, Local 61.

Q. When did you become a member?

A. October 27th.

Q. Were you present at that meeting at Webster Sams' place? A. I was.

Q. And you signed up then?

A. Mum-hmm.

Q. And you've remained a member since that time? A. I have.

Q. And you're still a member, are you?

A. Yes. [242]

* * * * *

Q. Had you been a regular employee of the company—I mean a full time employee?

A. Well, just—I have been on a favored basis, as Mr. Giesy puts it, during the school months.

Q. What do you mean by a favored basis?

A. Well, I work half a day and then go to school half a day.

Q. Is that considered as your regular job then with the company?

A. I don't know how they consider it.

Q. Well, what do you feel about it?

A. Well, I thought it was.

Q. You felt that you had a steady job?

A. Yes. [243]

(Testimony of Ray Joyner.)

Q. Work a half a day and then go to school half a day during the school period?

A. And work full time during the summer.

Q. And work full time during the summer?

A. That's right.

* * * * *

Cross Examination

Q. (By Mr. Masters): Did you talk to Mr. Giesy on December 23rd, 1953?

A. I believe it was somewhere around that date.

Q. Did you go into the office, or call him on the phone?

A. I was in the office, the outer office.

Q. At that time, did you have quite an argument with him? [244]

A. Well, I believe we had a heated discussion.

Q. Did you challenge him to a fight at that time? A. I think so.

Mr. Masters: That's all.

Redirect Examination

Q. (By Mr. Bailey): What was the reason for that?

A. Well, I had asked for employment, and the way Mr. Giesy talked there was no work to be done, but I could see—I had been working around there—and I knew there was clean-up work to be done. So, I thought he was just putting me off.

Q. Did he give you any reason for not employing you at that time?

(Testimony of Ray Joyner.)

A. No. He said he would talk to the foreman, Claude Turner, about it.

Mr. Bailey: No further questions.

Recross Examination

* * * * *

Q. (By Mr. Masters): Repeat the conversation, as you recall it, at that time, and I'm referring specifically to your statements to Mr. Giesy about what you wouldn't have to do.

A. What I wouldn't have to do?

Q. For employment.

A. I don't understand the question.

Q. Repeat the conversation as you recall it.

A. Well, I can't remember much, but my intentions, when I went down there, was to straighten out with the Employment Service my eligibility for unemployment compensation, and I was asked to go and apply for work from Mr. Giesy, and I believe that's the way the conversation started. I asked him for work.

Q. All right, and then how did it continue after it started?

A. Well, I believe he made some mention that there was no work to be done, but he would consult the foreman, Claude Turner, to see what he could do for me.

Q. That's when you started getting mad, wasn't it, and—when he told you there wasn't any work, and you thought there was?

A. I believe that's probably right. [246]

(Testimony of Ray Joyner.)

Q. And then what did you say?

A. I don't remember.

Q. You testified earlier that you had a heated discussion. You do remember that it was a heated discussion?

A. I do.

Q. And by "heated", what do you mean? That there was some challenging, and you were telling him off?

A. Well, we were both giving each other advice.

Q. What kind of advice? What are you referring to?

A. Well, I was advising him how to run his business, and he was advising me about what a young man my age should know and should be learning.

Q. In this advice, did you tell him at that time that you didn't have to kiss anyone's ass to get employment?

A. I don't recall that statement.

Q. You don't recall saying that at all?

A. No, I don't. [247]

* * * * *

JESS A. HOWE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. McIntyre): How long have you been employed by the company?

A. Since August 13th, I believe.

* * * * *

Q. And were you working full time at that time? [250]

A. Well, when I first started, I just started at the harvest, and then when I went on the grinder or shortly after, why, they asked me if I still wanted steady employment, and I told them I did, and about two weeks before we were laid off in October, Dave Crockett sent over after me, over there at the warehouse, and I came over, and he said, "Do you still want steady employment?" And I says, "I do." So, he says, "I'm putting you on steady."

Q. But then you were laid off on October 30th with the other employees? A. Yes.

Q. On October 30th of 1953, were you a member of any labor organization?

A. I signed a card on the 27th at Sams' house that night when we had that union meeting.

Q. You attended the meeting at Webster Sams' house? A. I attended the meeting, yes.

(Testimony of Jess A. Howe.)

Q. After October 30th, when were you re-employed?

A. Well, I worked a few days off and on in November, and I think two days I worked, and I worked part of December. Then I was off until two weeks ago. I don't know which day it was. Two weeks ago Monday, I started back.

Q. Two weeks ago, and what job did you go back to?

A. Well, I went back, and I was on the grinder for a day or two and then they put me on the cleaner. [251]

Q. And you're on the cleaner at the present time? A. Yes, and sorting sacks.

Q. Now, during your employment with the company, have you been instructed or advised about keeping the area where you work clean?

A. No, I was never told to, because I knew it had to be done, and I done it without having to be told. I spent two days sweeping the building from top to bottom when I first went there. Outside of that, why, nothing was ever said to me about it.

Q. Did you have any—In October of 1953, did you have any conversation with anyone, other than Mr. Crockett, about steady employment?

A. Yes, I did. I was working on a Saturday evening. We had started—we had quit working all day Saturday, and we worked till noon, and one guy would work in the afternoon, and he'd have someone there, so, if a customer come in, why, they

(Testimony of Jess A. Howe.)

could load him up, and I was working on this Saturday afternoon and Mr. Giesy himself came in, and he said, "Jess, has Dave said anything to you about being on steady?"

I told him, "Yes, he told me I was on steady now, the year round." Then, he says, "Well, I'm glad to hear it because you're a good man. I'm glad to hear that you're going to be with us steady." [252]

* * * * *

RALPH H. JONES

a witness called by and on behalf of the Charging Party, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Bailey): And have you been employed by Monroe Feed Store? A. Yes, sir.

Q. When did you first go to work for them?

A. January 2nd, 1953. [255]

* * * * *

Q. And was that the job that you had on October 30th?

A. Well, it was driving truck and working in the warehouse.

Q. You had a combination job? A. Yes.

Q. What wages were you receiving at that time?

A. \$1.20 per hour.

(Testimony of Ralph H. Jones.)

Q. How many hours a week were you working?

A. Worked 55 and 60.

Q. Are you a member of a labor organization?

A. Yes, sir.

Q. Is that the Grain Millers that's here involved?

A. Yes.

Q. When did you become a member of that union?

A. October 27th, 1953.

Q. Were you present at Webster Sams' house?

A. Yes, sir.

Q. Along with the others?

A. Yes.

Q. At that time, you signed up?

A. Yes.

Q. Have you continued to be a member of the union up to this date?

A. Yes, sir. [256]

* * * * *

Q. Now, following your lay-off—you were laid off on October 30th with the others, were you?

A. Yes, sir.

Q. And have you since been re-employed by the company?

A. Yes, sir.

Q. On what date was that?

A. November 3rd, 1953.

Q. And what job did you have when you went back?

A. I went back to work helping in the warehouse and drive the truck.

Q. And is that similar work to what you had just prior to the October 30th lay-off?

A. Yes, just about the same. [257]

* * * * *

TOM COOK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. McIntyre): And where are you employed, Mr. Cook? A. Monroe, Oregon.

Q. And how long have you been employed there?

A. I've been employed there since 1951. September the 10th.

Q. And have you been employed steady since that time? A. I was till I was laid off.

Q. That was in October? A. That's right.

Q. That was with the other employees on October 30th? A. Right.

Q. On October 30th, were you a member of any labor organization?

A. I signed a card with the rest of them, yes.

Q. And that was for the same Grain Millers Union? A. Yes. [260]

* * * * *

Q. Now, after October 30th of 1953, when did you go back to work?

A. I went on Tuesday morning.

Q. Tuesday morning? A. Right.

Q. Who hired you back?

A. Wayne Giesy.

Q. And when did he hire you back?

(Testimony of Tom Cook.)

A. Monday morning about 9 o'clock.

Q. And where did that take place?

A. Well, I started down to the post office. Wayne was coming across to the mill to go to work, and he said he'd like to talk to me. I says, "O.K.", and we went over to the office, and we got in the office and he says he's going over for his breakfast and wanted me to go along and have a cup of coffee with him, and I did. That's when he hired me back.

Q. Did you have any conversation at that time about hiring back?

A. No, I can't say we did. He just asked me if I'd go back to work, and I told him I couldn't that day, but I'd be back Tuesday morning.

Q. In that conversation, was any mention made about the union?

A. Oh, there might have been a little brought up. I can't say what it was at the time.

Q. Do you recall if anything was said at all about the union?

A. Well, I think he asked me what I thought about it.

Q. Did you tell him what you thought of it?

A. I told him that I didn't know nothing about it because I never was in a union in my life, and I didn't think too much about it right at the time.

Q. And that took place at the time——

A. When he hired me back.

* * * * *

Q. Now, did you, during the time of your employment with the company, have you had instruc-

(Testimony of Tom Cook.)

tions about keeping the area where you work clean? [262]

A. I did.

Q. And who gave you those instructions?

A. Well, Wayne has told me that, and Mr. Turner has told me that.

Q. And were they general instructions to all of the employees, or to you specifically?

A. No. It was to the whole bunch working there to my knowledge.

* * * * *

Cross Examination

Q. (By Mr. Masters): When you talked to Mr. Giesy, when you had coffee with him on, I believe it was November 2nd, about Monday, before you talked to him, relate as well as you can remember it how he asked you to come back to work?

A. Well, when we got laid off on the day that we all got laid off, when we drew our checks that night, I says, "Well", I [263] says to Wayne, I says, "Well, this is it." He says, "Well, I can't say for sure." He says, "Well, we'll check our books tomorrow", and he says, "and take inventory", and he says, "then we'll—", he says, "You come back down Monday, and I'll let you know."

So, I went out on Saturday to look for some other work, and I had to go down to get my mail on Monday, and, as I walked down there, he told me to come and have that coffee.

Q. And you then went in to have some coffee, is that it?

(Testimony of Tom Cook.)

A. That's where we finished up at. I went over to the mill with him first.

Q. What I'm getting at is this: Did you talk—
did he ask you if you were a member of the union
at that time? A. I believe he did.

Q. And you told him you had a signed a card?

A. I told him I'd signed a card. [264]

* * * * *

ELLIS CONN

a witness called by and on behalf of the Charging
Party, being [264] first duly sworn, was examined
and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Bailey): Have you been employed
by the Monroe Feed Store? A. I have.

Q. When was the date you were first employed?

A. Well, I believe it was July the 10th of '53.

Q. And on what position were you employed?

A. I was a grinder helper.

Q. Grinder helper, and you continued on at
that occupation until—— A. The lay-off.

Q. Until when? A. Until the lay-off.

Q. And you're referring to the lay-off of Octo-
ber 30th? A. October 30th.

Q. Did you become a member of any labor or-
ganization? A. I did.

Q. And when was that?

A. October 28th, '53.

Q. And what union was that?

(Testimony of Ellis Conn.)

A. American Federation of Grain Millers.

Q. That's the local that's in this case? [265]

A. Yes.

Q. Have you remained a member since you joined? A. I have.

* * * * *

Q. Were you subsequently re-employed by the company? [266]

A. Was I re-employed?

Q. Yes. A. I was later.

Q. When was that?

A. I imagine it was around the 23rd or 24th of January of '54. [267]

* * * * *

AUSTIN LEE STEVENS

having been previously sworn, was recalled by and on behalf of [272] the Charging Party, was examined and testified as follows.

Direct Examination

* * * * *

Q. (By Mr. Bailey): Have you seen the machinery that's in the plants at either Monroe or Corvallis of the Monroe Feed Store?

A. Briefly.

Q. Briefly. Have you seen similar type machines in other plants? A. I have.

Q. Have you had an occasion to watch the breaking in of an individual, or the instructions of an individual on such machines?

(Testimony of Austin Lee Stevens.)

A. Yes, I have. We do it in all of our plants.

Q. What is the normal time it takes to make a competent grinder operator?

A. Grinder operator?

Q. Yes, grinder operator.

A. Well, in our operations, it takes a very short time usually.

Q. What's the reason for that? Is it a skilled operation?

A. It's not a highly skilled job in our opinion.

Q. What about a cleanerman?

A. A top cleanerman, such as a supervisor, it may take time, but most of the plants the supervisor oversees the setting of the machines, and, once your machine is set, the machine does the work, and the man—the cleanerman's main job is to keep it in operation.

Q. What is your estimate of the time necessary to be a competent cleanerman?

A. A man to operate the cleaner?

Q. Yes.

A. You mean from setting sieves, and so forth?

Q. That's right.

A. That would vary on the individual. It may take two weeks, two days, or two years. It depends.

Q. Well, what would be the average time?

A. I would say, outside of a supervisor, two to three weeks. [276]

* * * * *

Mr. Masters: At this time, Mr. Examiner, I

would like to move on behalf of the Monroe Feed Store to dismiss the complaint on the grounds that the Monroe Feed Store is not engaged in commerce within the meaning of the Act, and on the ground that the practices charged would not affect commerce within the meaning of the Act, and on the further ground that it would not effectuate the policy of the Act for the Board to take jurisdiction in this case. [279]

* * * * *

Trial Examiner: Well, I will deny the motion, so far as it's based upon lack of jurisdiction of the Board. I believe that the General Counsel has established facts which would [281] justify the Board in taking jurisdiction under any standard the Board has, and, of course, it's sort of in a state of flex there and no one's able to show what those standards are, but I believe it satisfies whatever standards the Board now has for an assertion of jurisdiction.

To the extent that the motion further looks toward the dismissal of the complaint, I'm not prepared to grant such motion at this time, and I do deny it.

Do you want a moment or two, Mr. Masters, at this point?

Mr. Masters: I'm not quite clear on the relief that's asked for here. It's my understanding that in the complaint there is an alleged violation of 8(a)(1) and 8(a)(5), nothing on 8(a)(3). However, I don't see that there's any way at this time to raise any objection on what might be claimed later as to the relief that they're entitled to, but I would like to make that statement.

At this time, I am going into this hearing on the basis of the complaint, in which it's alleged it's only a violation of 8(a)(1) and 8(a)(5).

Trial Examiner: That's correct. [282]

* * * * *

ROBERT E. LOOMIS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Masters): Mr. Loomis, I understand that you are employed by the Monroe Feed Store?

A. No. I'm employed by E. F. Burlingham & Sons.

Q. Do you do some work for the Monroe Feed Store?

A. I do the bookkeeping, that is, the control of books, yes.

Q. Now, have you been doing that during 1952, '53 and '54?

A. I have. [283]

* * * * *

Q. (By Mr. Masters): I have here an exhibit marked Respondent's 1. Could you tell me if you are familiar with that, those figures?

A. Yes, I am.

Q. Would you state what they are?

A. Well, it's the profit and loss statement for September, 1953.

Q. And was that taken directly from the records of Monroe Feed Store?

(Testimony of Robert E. Loomis.)

(The document heretofore marked Respondent's Exhibit No. 1 for identification, was received in evidence.)

RESPONDENT'S EXHIBIT No. 1

MONROE FEED STORE

Sept. 1953

Inv at Beginning	72497.81	Sales	471031.84
Purchases	462663.78		
Returns	1399.01		

536560.60

Inv at End of Period 117707.05

424853.55

471031.84

424853.55

46178.29

Expenses 66449.87

Depreciation

Autos 763.74

Bldg. 800.00

Furniture 75.29

Mach 1164.66

Equip 89.40

Reserve Bad Debts 1177.58

70520.54

Mdse 46178.29

Mill 10404.44

Miscel Income 24.00

56606.73

70520.54

A/C Payable 16233.39

86753.93

Loss 30147.20

Q. (By Mr. Masters): Did you talk to Mr. Giesy on the telephone on October 30th?

(Testimony of Robert E. Loomis.)

A. I don't think I did. I don't believe I did.

Q. Have these figures subsequently turned out to be erroneous in part that you know of?

A. No, not that I know of.

Mr. Masters: That's all. [286]

Cross Examination * * * * *

Q. (By Mr. McIntyre): And then you made up this slip for them?

A. I made up the profit and loss statement there for my own books, yes.

Q. And then did you give them a report of your findings? A. Yes, sir.

Q. And this is your findings?

A. That's a copy of it. [287]

Q. And when did you advise—when did you give them that report? How did you send it to them?

A. Well, I mailed it to them. * * * * *

Q. And then you had received the inventory, and then you made this report from the inventory, is that not right?

A. Yes. I would say that was probably mailed to them the latter part of October because these inventories are slow in coming. Sometimes their check book stubs are slow in coming, and we have a good many of these branches that we do the same thing with. * * * * * [288]

Q. Now, is it my understanding that for September that the company's earnings amounted to about \$10,000 on this report, and that the labor cost amounted to about \$39,000?

(Testimony of Robert E. Loomis.)

A. I wouldn't know about that without looking at the figures. September—whatever your figures are there—would be a cumulation from May 31st. Their books close on May 31st.

I can tell you. That's on what date? What month did you want on the labor?

Q. Well, what about—— A. September?

Q. What about for the month of September?

A. Well, the accumulated labor from the 31st of May to the end of September was \$39,822.

Q. You didn't have it broken down in months at that time?

A. I don't break it down on these, no.

Q. Did you have it broken down for the month of October?

A. Well, October's labor was \$8,600.

Q. And what about the mill earnings?

A. The mill earnings are cumulative too. The mill earnings at the end of September were \$10,404.

Q. \$10,000, and the labor at that time was \$39,000? A. \$39,000. [290]

Q. Now, what about this figure for labor, \$8,600? What are the earnings for that period?

A. The earnings for that period would be \$3,600.

Q. \$3,600. Now, do you have any other month broken down, other than——

A. These are cumulative. They're not broken down by months. I was breaking this down and subtracting these in my head right now.

Q. Would you be able to break it down, compar-

(Testimony of Robert E. Loomis.)

ing the \$39,000 and \$10,000—would you be able to break it down for the month of September?

A. September, that would be——

Q. September would be cumulative from May, has it not, in that report?

A. Yes. Do you want to know what it was just for September?

Q. Just for September, yes.

A. Well, his labor for September was \$9,100.

Q. And what was the——

A. His mill earnings for that same month, which is one of his biggest months, was \$5,600.

Q. \$5,600?

A. Now, that's mental arithmetic, remember.

Q. That's for September though?

A. That's for September.

Q. And this \$8,600 and \$3,600 figure, that's for October? [291]

A. That would be for October.

Q. What about—do you have—can you break it down for November?

A. November over October——

Q. Well, October we've got, I believe, \$8,600 and \$3,600, and then if you've got November——

A. November labor was \$3,800.

Q. \$3,800? A. Yes.

Q. And what about the net earnings?

A. The mill earnings, \$6,200.

Q. \$6,200? A. \$6,200.

Q. That's for November?

A. That's for November.

(Testimony of Robert E. Loomis.)

Q. Could you break it down for August?

A. August—it's mental arithmetic.

Trial Examiner: It seems to be satisfactory though.

The Witness: Well, August—his August labor was \$14,000.

Q. (By Mr. McIntyre): \$14,000?

A. Just a minute—\$14,800.

Q. \$14,800, and what is the net earnings?

A. His mill earnings—and August is a poor month for you to ask that question because they're just starting cleaning—his mill earnings were \$1,300. [292]

Q. How much? A. \$1,300.

Q. \$1,300. Now, the figures that I have, I have for September labor cost of \$9,100 and mill earnings at \$5,600. Now, would you consider that, after having examined his books, as one of his better percentage months?

A. Well, I don't know as to that. I would figure August and September should be his best months, as far as cleaning.

Q. August and September?

A. Yes, because the grain and seed come in pretty well.

Q. Well, August he didn't do pretty well. August labor costs were \$14,800, and mill earnings were only \$1,300. What is the reason for that?

A. Well, this last year, '53, I suppose that the harvest was a little bit later than ordinary. That might have some bearing on it.

(Testimony of Robert E. Loomis.)

Q. Well, now, would you say that your mill earnings should be at least 50 per cent of your labor cost, shouldn't they?

A. They should be more than that.

Q. They should be more than that?

A. We have plants that the mill earnings will take 70 per cent of the labor. We have other plants that the mill earnings take all of the labor. [293]

* * * * *

Q. (By Mr. Bailey): I'm a little bit slow in regard to figures, but Mr. McIntyre was asking you about mill earnings. Is that the net earnings of these operations here that he was talking about?

A. The mill earnings—what we call mill earnings is the charge that they make for cleaning seeds, grains, or mixing of special mixes, that is, in grinding, and things of that kind. [294]

Q. It has no connection with profit and loss then?

A. It has a connection with profit and loss, yes. It goes in as an earning.

Q. As I understand Respondent's Exhibit 1, that is an accumulative index as of September 30th?

A. From May 31st, yes. * * * * *

Q. But my understanding of your testimony, Mr. Loomis, the [295] purpose of this was to determine how this group of warehouses—now, is that referring to the Burlingham & Sons group of warehouses, or what group did you mean?

A. Yes, it would be the E. F. Burlingham group of warehouses, yes.

(Testimony of Robert E. Loomis.)

Q. And that's the one that's being financed by the Bank of California?

A. Yes. That is, there are two groups. One group comes under the name of Burlingham-Meeker at Amity, which owns the group on this side; that is, they're grouped that way, the corporation, and one corporation owns the stock of the other corporation or a portion of the stock.

Q. In other words, sort of a holding company situation?

A. No, it isn't a holding company.

Q. But it operates on that principle?

A. Oh, it might.

Q. Now, do you furnish the rest of this group with a similar type statement?

A. Every month.

Q. How have those generally been?

A. Well, as I say, we have one that the mill earnings pay all the labor it has, and we have another one at——

Q. Which one is that?

A. At Dairy. Of course, you can't compare Dairy with Monroe too well because it's more or less of an automatic mill. There [296] isn't the hand labor that's used here.

I would compare probably the plant at Amity with the one at Monroe, as far as the labor cost should be as to the tonnage they handle, and Amity will pay—their mill earnings will just practically balance their labor, not quite.

Q. Now, are there any of the other groups that

(Testimony of Robert E. Loomis.)

have a comparable experience to the Monroe Feed Store, any other group, I should say?

A. You mean as to what?

Q. Well, you're speaking here about a loss situation. Does that exist in any of the other operations?

A. We have losses in some of the others too, and they're getting the same going-over that Monroe has.

Q. Did they lay off all their employees?

A. No.

Q. How long have you been doing this sort of work for Burlingham & Sons?

A. Sixteen—let's see—sixteen years. [297]

* * * * *

JUNE L. URBACH

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Masters): Are you employed at the Monroe Feed Store now?

A. I am. [316]

Q. In what capacity? A. Bookkeeper.

Q. Were you there in 1952 and '53?

A. I was.

Q. Did you make out the paychecks on October 30th when the employees were laid off?

A. I did.

Q. And was that at Mr. Giesy's direction?

(Testimony of June L. Urbach.)

A. It was.

Q. Had you heard any conversation in his office on October 30th that related to the discharge of the men on that date?

A. The morning of October 30th, he informed me, when I got to work, that he had had a call from Forest Grove, and that we would have to curtail our operations and lay off some of the men.

In the afternoon, he told me to write out the pay-checks.

Q. Had you at any time heard any conversation prior to October—prior to the time the men were laid off concerning union activities?

A. I had not.

Q. Did Mr. Giesy talk to you on October 30th concerning any statements made about union meetings?

A. He did not.

Q. Were you present on November 3rd or 4th when Mr. Giesy and Mr. Mumford had a conversation in the office? [317]

A. I was.

Q. Would you relate, to the best of your recollection, the conversation?

A. Well, let's see. Kenny came in that day, and he asked him, he says—Wayne says, "I hear you filed a charge against me", and Kenny says, "Oh, no, I didn't", and Wayne says, "Well, you must have."

Kenny says, "Well, they had something for me to sign, but I don't know what it was", and he says, "Frank signed a great long one". He motioned with his hands, and he says, "I only signed a little short

(Testimony of June L. Urbach.)

one." Wayne says, "Well, maybe perhaps the little short one could be just as much as the big long one", and Wayne asked him if he had ever told him anything prior to this time about having a meeting, and Kenny said, "No", he says, "I never told you." [318]

* * * * *

Q. (By Mr. Masters): Have you ever heard Mr. Giesy make any statement to the effect that he would shoot himself before he would go union, or anything like that? A. No, I haven't.

Q. Have you any knowledge of the reason for the discharge, other than you've given here, of the men on October 30th?

A. I have not, no. [319]

* * * * *

Redirect Examination

Q. (By Mr. Masters): I didn't understand that there was any part of your testimony that was false at this time, as intimated by General Counsel for the National Labor Relations Board.

However, I would ask you now to relate to the best of your knowledge and recollection exactly what the conversation was between Mr. Mumford and Mr. Giesy that you heard on October 30th.

A. Kenny came in and he said, "We sure had a meeting out to Sams' last night", and that was all that was said. He said, "We had a good get-together."

Q. Was the word "union" or "organization", or anything, used at all?

A. Not whatsoever. [325]

* * * * *

Mr. Masters: At this time, I would ask the General Counsel to produce the affidavit of David O. Crockett, which I understand is in your file. I would like to introduce it in evidence at this time, and have it marked as Respondent's 2. Mr. Crockett is deceased, and he gave a sworn affidavit to the representative of the National Labor Relations Board.

Mr. Bailey: Mr. Trial Examiner, I have never seen this specific exhibit. I certainly wouldn't have the opportunity to cross examine on it.

Trial Examiner: It would have to go in on stipulation.

Mr. Bailey: That's impossible, because I've never seen the [328] affidavit he's talking about.

Trial Examiner: Well, the request is made of the General Counsel to supply the affidavit. That's first, is it not?

Mr. Masters: Yes.

Trial Examiner: Have you seen a copy of the affidavit?

Mr. Masters: I just saw it. Yes, I have it here.

Trial Examiner: So, you know what the affidavit consists of?

Mr. Masters: Yes.

Trial Examiner: Now, your problem is to get it into evidence?

Mr. Masters: That's right.

Trial Examiner: I know of no way you can do so except by stipulation.

Mr. McIntyre: Neither do I, and not by stipulation of General Counsel, certainly.

Mr. Masters: Is it the position of General Counsel then that he refuses to put the affidavit in evidence?

Mr. McIntyre: Correct.

Mr. Masters: Well, I have a document to be marked Exhibit 2.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

Mr. Masters: I have here a document marked Respondent's Exhibit 2, stating "United States of America, Before the National [329] Labor Relations Board, Nineteenth Region, State of Oregon, County of Benton, Affidavit.

"I, David O. Crockett . . ."—

Mr. McIntyre: I'm going to object.

Trial Examiner: To reading the affidavit?

Mr. McIntyre: To reading it, definitely.

Trial Examiner: Well, there's no purpose to be accomplished by it. Let's see. Obviously, you want to offer that in evidence.

Mr. Masters: I do.

Trial Examiner: On the present state of the record, and any state of the record that I can imagine, except by way of stipulation, I think it would have to be rejected, but, of course, we do have a device called a rejected file whereby such an offered exhibit would be carried along by the Reporter and submitted to the Board in that form, in the rejected form, so that in the event the Board decided that the ruling is incorrect, they could reverse it and have the advantage of the exhibit.

Now, as a preliminary to it, I suggest that counsel be asked to stipulate that what Mr. Masters now holds in his hand and what has been marked as Respondent's Exhibit No. 2 is in fact an affidavit executed on or about a certain date by Mr. Crockett.

Mr. McIntyre: Is it the desire of the Trial Examiner to have duplicates for the rejected file too?

Trial Examiner: Oh, I suppose the duplicate rule applies [330] to the rejected file, as well as any other. However, if it is an unreasonable burden and would cause duplication at this late hour——

Mr. McIntyre: I'll furnish counsel with a duplicate. I will stipulate that this is a true and correct copy of the affidavit that the General Counsel has.

Trial Examiner: And that the affidavit is what it purports to be, a statement given by a certain individual, whose signature is appended before a field examiner of the National Labor Relations Board on the date shown?

Mr. McIntyre: That is correct.

Trial Examiner: Now, we'll see if Mr. Bailey will agree to that.

Mr. Bailey: I would have to go along on the basis that I assume counsel representing the other parties here know what they're talking about. I have no knowledge myself, but I would be willing to enter into a stipulation for that purpose only.

Trial Examiner: All right, then, there's no question about it for identification of the document. The only question is as to its competency, and I rule that it is incompetent, and Respondent's Exhibit 2 will be filed in the rejected file.

(The document marked Respondent's Exhibit No. 2 for identification, was rejected.)

RESPONDENT'S EXHIBIT No. 2

[Rejected]

United States of America

Before The National Labor Relations Board

Nineteenth Region

AFFIDAVIT

State of Oregon,
County of Benton—ss.

I, David O. Crockett, a person of lawful age, being first duly sworn, make the following statement voluntarily and of my own free will:

I live at 1393 Franklin Street, Salem, Oregon. My telephone number is 2-6000. I am the manager of the Corvallis store of the Monroe Feed Store.

On or about Wednesday, October 28, 1953 I went over to the Southern Pacific depot to get some cars turned loose and one of the fellows there whose first name is Bill, who clerks there asked me what happened at the Union meeting the night before at Belfountain. I didn't want to admit to him that I didn't know what was going on so I just turned it off. When I came back to the office Webster Sams and H. G. Gann were eating lunch in the display room. I asked Webster then if he had attended a union meeting down in Belfountain. He said, "In order to have a union meeting you have to have a meeting in a union hall don't you?"

I said: "No, I don't think so. I've attended a lot

Mr. Masters: The record will show that one copy does not have the signature on it. It's a copy of everything but the signature, and there has been testimony that Mr. Crockett is deceased, which is the reason for the offer of this affidavit, rather than his testimony.

Trial Examiner: Yes.

* * * * *

WAYNE R. GIESY

having been previously sworn, was recalled by and on behalf of the Respondent, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Masters): On October 30th, 1953, you fired the employees of the Monroe Feed Store?

A. Yes.

* * * * *

Q. Will you state the reason for this?

A. Well, it would be a culmination of reasons. It started [332] about two years ago. First of all, it's more difficult to borrow capital, and, at the end of 1953, our fiscal year ended May 31st, our profits were very, very small. As a matter of fact, with a plant and operation of over a million dollars in sales, our profits were less than \$5,000.

The year prior, the year ending in 1952, our profits were in excess of \$16,000.

At that time, the Board of Directors of Monroe Feed Store made it very pointed that, if we were to continue operating and borrowing the necessary

(Testimony of Wayne R. Giesy.)

amounts of capital, we would have to have better record-keeping and find out where our errors were being made, if any, and, by doing that, they instigated the inventory system, which was to start on September 30th.

By doing this, we handed in our inventories on September 30th, and at that time—I shouldn't say we handed them in on September 30th. We took them on September 30th, and it would take us several days to price them. We would have to compute the values, consolidate them into a report, and send them to E. F. Burlingham & Sons' office in Forest Grove to enter in the master bookkeeping.

At that time, the report came in that showed—I received the final report on October 30th, stating that we had a \$30,000 loss.

Q. Is that the report referred to as Exhibit Respondent's 1?

A. Yes. That's the financial profit and loss statement.

Q. Made by Mr. Loomis?

A. Made by Mr. Loomis.

Q. Had you talked to anyone from the office of Burlingham & Sons on October 30th?

A. Yes, I did talk to someone on October 30th, which is indicated also by our telephone bill, showing a call to Forest Grove. During that time, they told me it would be necessary to take very drastic action to at least see that our P. & L. was in proper shape in the future.

(Testimony of Wayne R. Giesy.)

The decision as to what to do was left up to myself.

Q. That decision then to fire those employees was your own decision?

A. That was my own decision.

Q. Did anyone ever suggest that you fire all your employees, any other officer or other director of the store?

A. No, but I think you can understand that, if a report comes in that shows you've a \$30,000 loss from the beginning of the fiscal year, you would be rather concerned about it, and, at that time, from the time of the phone call until such time as I made up my mind to lay the men off during the day, that was my entire decision. I was not told what to do.

Q. Had you intended at that time to fire them completely, or did you intend to rehire some back later?

A. At that time, I was not in position to know just exactly what steps were necessary. So, I decided that I would discharge [334] every one of the employees, and, from Friday evening until Monday, I devoted my full time to the operation, deciding what phases we would bring back.

I wasn't in position on Friday evening to commit to any individual what we would do, and Monday I wasn't definitely sure in all cases what we should do. However, it was decided over the weekend that we would run the grinding operation at Monroe at least.

(Testimony of Wayne R. Giesy.)

Q. You mean then that you would discontinue the cleaning operation, and run only the grinding?

A. Discontinue the cleaning, and run only the grinding because our largest amounts of money were spent—as far as labor-wise—were spent on the cleaning operation, and there were lesser amounts of employees on the grinding operation.

Q. Would you explain the cleaning process, and also the mixing and grinding process?

A. I'll start on the cleaning process first. In the cleaning process, we have talked of two different types of things here, I think, that have been confused. First of all, we have talked about scalping machines.

This past year, and I'll quote from a note here, at the Monroe operation we shipped 14 cars of what we classify "clean seed". For the same period—that was the period ending October 30th from the start of harvest—for the same period in '52, at the Monroe operation, we shipped 28 carloads [335] of clean seed. That was just double at the Monroe operation.

At the Corvallis operation, in '52, we shipped 23 cars of clean seed, and this past year ending October 30th we had only shipped 10 cars of clean seed.

Now, this is brought about by the Government is not advocating quite as strongly for the winter cover crop seeds, which are entirely processed on the small cleaning equipment, and, just by this very fact alone, and by the small amounts of grain we had left at October 30th yet to clean, I would

(Testimony of Wayne R. Giesy.)

have had no justification to any of the Board of Directors to continue the operation on the basis that we had, because we didn't have enough amounts of cleaning there to do.

Now, in cleaning, this particular type equipment, this is what we call run over a unit, if it's vetch, and a unit, if it's rye grass. The unit for vetch is one 29-D clipper, a hook carder in between the machines, and another 29-D clipper. The clippers are screen machines. The carders are disc machines.

First of all, on the small cleaning, you scalp off the rough material off the top screen. The seed that you are trying to process would then drop through the first screen and remain on the second screen. The fine stuff that you are able to screen out goes through the second screen, and the grain that you still desire floats over the top of the second screen and drops to the next shoe. You have a very similar system on the second shoe of that first machine with two screens, a top and a [336] bottom, and you do likewise only you have a finer screen.

From there, the seed that you desire is re-elevated, drops to the lower level, re-elevated, and put through a hook carder. Now, we'll say, for example, it is hairy vetch we're after. Most crops are grown in combination with what we call oats and vetch, and, in that mixture, it can be chaff, weed seeds, oats, volunteer barley, and perhaps some wheat and vetch.

Q. Those are all screened out then in one operation?

(Testimony of Wayne R. Giesy.)

A. Those are completely separated by the time that they go through this particular unit, and the large carder—the vetch and the wheat, first of all, is separated because they drop into a round disc or a slot disc and are lifted from the long oats which won't catch in this particular unit.

Then that material is dropped onto the second screen machine to be regraded and fanned again to relieve it of all the dust. You still have your wheat and your vetch together, which are very similar in size. The vetch is very circular, will roll very rapidly from the second screen machine to where it is put through a draping machine. This draping machine is a series of canvases, a bank of 10, and they travel what I consider uphill. At the upper edge—I shouldn't say at the upper edge—at about the middle of this draper, this vetch and wheat is distributed onto the canvas. The vetch, being very circular, rolls rapidly off the lower part of the canvas, and the wheat, being irregular in shape, is carried to the top of the canvas and [337] separated.

In this cleaning operation, we've taken, first of all, what we classify as the pods off the light screens or off the top of the first screens. When it comes onto the second screen, the wheat and vetch and oats remain together, and we've taken through the bottom of the second screen what we would classify medium screening, and that would be small grain, or something that wouldn't be of full size.

When it goes into the carder, there's another

(Testimony of Wayne R. Giesy.)

separation made of the oats and barley, and another of wheat and vetch. Then on the third machine—rather, the fourth machine, on the draping machine, the wheat and vetch are separated by the process I just mentioned.

As the vetch drops from the draping machine, it is put through a grader, which is a circular disc, punched full of some 8/64 round holes up to 10/64 round holes, and, by running it through this circular grader, you separate out the different grades of the vetch that you wish.

Now, this is the thing that I mentioned to begin with, that you could separate several different items in one cleaning operation, not referring that you make clean seed out of all of them, only that you may separate—make the separation of all these different items.

Now, in that operation, you can see that it takes a great deal more time than it would be going back now to a scalper, [338] which is a similar type screen machine, a gigantic machine, and, whether we use our scalper—what we use it for is processing malting barley. In processing malting barley, the maltsters put the grain and the barley that is to be a berry—when I say “a berry”, that is the particular kernel that will pass over the top of a slotted screen of measurements of $5\frac{1}{2}/64$ ths by $\frac{3}{4}$ inches long, and, in doing this, you drop out all the small kernels that are undesirable, to supply the maltster with a berry that is uniform in size and will sprout uniformly, and, after all, it is the

(Testimony of Wayne R. Giesy.)

sprouting and attacking of the enzymes on the starches that makes the malt. That's the reason for the uniformity and the desire for it.

In doing this, we can process up to two—sometimes three—carloads of barley in a normal working day, where with two to three units of the small cleaners, it would be very difficult for us to process as much as one carload of clean seed in a day. Three men run a large scalping machine, whereas it would take perhaps—when I say it would be a carload of clean seed on three units in a day with small cleaners, you would have 12 or 13 men busy on the small cleaners producing a maximum of one carload of clean seed in a day, whereas, on the large scalping machine, in a 24 hour period, we have produced a maximum of four cars of malting barley through this machine.

Now, the change in the operation is the trend is away from seeds and into more grains. As you see in our shipping records [339] here, we shipped in one case just half the number of cars, that is, at the Monroe plant, and, in the other case, we did not even ship half the number of cars of seed this year that we did the prior year, and the backlog of seed and grain that we had left to process, when I received my September 30th audit figures, did not justify and I could not justify to the other directors of the Monroe Feed Store that we had sufficient work to keep the men on.

So, when I showed as badly in my figures as I had, it was my decision to lay the entire crew off.

(Testimony of Wayne R. Giesy.)

Since that time, we took back the grinderman, and I think, as he had indicated, when he had talked to me, he told me that he had signed a union card, and I did not discriminate against him because he was a reasonable employee, and he still is.

Q. Who are you speaking of?

A. That's Tom Cook. That was the first man I took back.

Q. That's at Monroe? A. At Monroe.

Q. And you took him back in mixing and grinding feeds, did you?

A. That's right, and that was the decision I had made over the weekend, to operate the mixing and grinding on a minimum basis until such time as we could decide what we would operate throughout the plant.

Q. Who was the next person you took back there?

A. The next person that we took back at Monroe was Floyd Cantrell, Jr. [340]

Q. And to do what type of work?

A. To do hauling, as he had done before, and to——

Q. Did you—pardon me.

A. ——and to verify my record on that, Floyd Cantrell was informed at the time of his employment that we would base his wages at a minimum of \$1.50 an hour and try to justify a tonnage rate over the period of the next two or three months when we had the hauling records behind it.

Now, the next man we took back at the Monroe

(Testimony of Wayne R. Giesy.)

plant I believe—well, in the meantime, we employed Elmer Simons on the same type or basis that we had employed Floyd Cantrell.

Q. Did you go back into your cleaning operation then in Monroe?

A. We did not go back into the cleaning operation in Monroe to any degree, other than what Mr. Turner did periodically among his other duties at the mill, who was the foreman at that time. [341]

* * * * *

Q. How many men do you now have working in Monroe doing cleaning?

A. We have no one particularly assigned to the cleaning operation in Monroe.

Q. You have no one then that's doing full time cleaning work there? A. No, sir.

Q. Do you have the records on when Mr. Conn was—was he a former employee?

A. Since—yes. Since the lay-off on October 30th, we have expanded the sale of mixed and ground feeds into the Coquille area, which I mentioned in prior testimony, and, by doing that, we have ground and processed more mixed feeds and molaserized screenings for that particular area. That has entailed more hauling. It has entailed the use of a mixerman to be put on during the evening, and we drew Ellis Conn back at the time that this work load was too much for the one man to do.

Since that particular period of time, he was relieved because he didn't show up for work, and we had reason to believe it was from other causes

(Testimony of Wayne R. Giesy.)

than what were in the normal line of every day living. [344]

* * * * *

Q. (By Mr. Masters): Mr. Cantrell, Sr., according to the evidence to date, has been shown to be the one oldest in the service at Monroe. He was not hired back. Were you hiring your men back on a seniority basis or why did you hire them back in the order that you did?

A. The reason that I hired the men back in the order that I did was that I picked the men out of the group, men that had been working with us before, that I thought would fit into the particular jobs that we had to offer better than any of the others, not on a seniority basis.

In that particular case, Mr. Cantrell is very good at some jobs. He had one habit of standing by doors, which is mentioned in his conversation that I hated to see a man stand idle, and that I didn't particularly approve of. Other than that, I certainly have no complaints about Mr. Cantrell.

On his particular type of cleaning, Mr. Cantrell did a good job. In the overall picture, I [345] didn't think he would fit into the amount of jobs that we had at this time. [346]

* * * * *

Q. Are you doing enough cleaning of seed to warrant rehiring Mr. Mumford at any time after he was discharged?

A. We haven't up to date. I'll correct that to this degree: We haven't had cleaning for him over

(Testimony of Wayne R. Giesy.)

and above the other two boys that we hired to do it. I will put it in that fashion. We hired Frank and Don Harrington to work on those particular jobs.

* * * * *

Q. You had a conversation with Mr. Joyner when he came to your office in December about getting work again. Is that the first time he had asked for work after he was let go? [347]

A. Yes, it was.

Q. What date was that, do you recall, December 23rd?

A. I don't recall the exact date. That could have been very close to the date.

Q. Would you relate, as well as you can, that conversation that you had with him at that time?

A. From my recollection, his first comment was that he wanted to be re-employed, and he mentioned perhaps neither one of us were combing one another's fur correctly, and I said that at that particular time I didn't have anything for him to do, and his next comments were he was being tired of being pushed around by " * * * you big bastards", and I asked him pointedly if that referred to me, and he said, "No." During the conversation, I told him the best way that a young fellow could get along that needed employment would probably be to state what his problem was and ask if there would be a solution to it, rather than approach an employer upon that basis, and, at that time, he stated that he did not have to kiss anyone's ass for employ-

(Testimony of Wayne R. Giesy.)

ment, which—the discussion continued for a short while, and he used some obscene language in addition to that, in addition to inviting me outside to fight a 17 year old boy, which, of course, I would not do under any consideration, and, that in substance was the basis of the conversation.

At this time, with his attitude towards us as it is, I wouldn't hire him under any consideration. It just wouldn't be [348] possible.

Q. What attitude are you referring to now?

A. His attitude toward us.

Q. His attitude that he was——

A. His attitude that he was being pushed around by big bastards and he had to kiss anyone's rear end isn't required of anyone that we ever had working with us. * * * * * [349]

Q. Mr. Emerson and Mr. Sams were doing cleaning prior to their discharge?

A. Yes. Mr. Emerson, at the time we shut down, was off from work due to a broken jaw that he received in some brawl over the countryside here at one of the dance halls, and he was not present at the time of the shutdown. He was notified by letter. I think under the circumstances I would rather not have the man back.

Mr. Sams was doing cleaning, and it's my testimony—and I have papers here to support it—that his cleaning jobs have not been satisfactory.

Q. In what respect?

A. Well, first of all, he does not take corrective criticism while working on the machinery regard-

(Testimony of Wayne R. Giesy.)

ing the necessary changes that have to be made in either the setup of the machinery or the continuation of its operation.

Here in front of me is a cleaning record that's dated September the 9th, that Mr. Sams worked on, that has 2.38 per cent [354] weed, which reduces the price of this particular rye grass seed by at least \$1.50 per 100, and, in the lot, there is 196 sacks and 25 pounds. That's 196 one hundred pound sacks and 25 pounds, and the purity of the material is only 97.45 pure, when it should be 99. The weed count is 2.38, and it should be less than a half of one per cent, or .50.

I have another cleaning record here that shows
— * * * * * [355]

Q. Did you on October 30th or any other time since then discharged any of these employees for union activities? A. No, sir.

* * * * *

Q. (By Mr. Masters): Have you engaged in any rehiring practice to attempt to defeat organizational efforts or discriminate against the union?

A. No, sir.

* * * * *

Q. (By Mr. Masters): At the time that you rehired Mr. Jones, Mr. Howe, Mr. Cantrell, Jr., Mr. Cook, Frank Harrington, Don Harrington, did you have any knowledge that they had signed union cards? [356]

A. Mr. Cantrell, Sr., had advised me that the majority of the men had signed union cards. That

(Testimony of Wayne R. Giesy.)

was on the day following the lay-off. So, I would say in the affirmative.

Q. Do you have a fluctuation in the amount of work that can be done in your mill in your operation? Does it fluctuate by seasons, or by years, or months?

A. Well, going back to the fall of 1952, which would be one year prior to the time of the lay-off, at the Monroe plant we had in excess of 500 tons of mixtures of grain or seed grains to be cleaned.

As of the lay-off, we had very little over 100 tons. I think it was between 105 and 110 tons of grain to be cleaned. The same percentages were at Corvallis, and I do not recall those figures, but we had very little cleaning to do.

The amounts of seed and grain that are delivered to us during the summer months will spell out exactly the amount of time necessary to keep the strictly seasonal crew and perhaps some of the men that we would like to keep steady during the fall and the winter, and, if it falls off too badly, we do not have anything for them to do. We are definitely seasonal to the degree that we receive from 100 to 300 tons of grain during the harvest season. It's stacked up and stored away for cleaning and processing, and when that has been completed, we have no further work.

This last year, as I mentioned before, the trend has been [357] away from seed crops, and has been for straight grain crops. Our large scalper has enabled us to handle the grain crops rather rapidly

(Testimony of Wayne R. Giesy.)

and put them into the proper shape for shipping, and that is one reason that we have this small amount of work during this winter period.

Q. On October 30th, you had a conversation with Mr. Mumford in your office around noon or 1 o'clock? A. Yes.

Q. Did he tell you at that time that there had been a union meeting, or union activity?

A. No, he did not.

Q. Will you relate to the best of your knowledge that conversation?

A. To the best of my knowledge, Mr. Mumford offered the conversation that they—when I say “they”—a group of the employees of the Monroe Feed store had had a get-together some evening prior to that time at Webster Sams’ place, and they had a good time, and that concluded the conversation.

* * * * *

Q. Did you have a conversation, a telephone conversation, with Mr. Crockett on October 30th?

A. With Mr. Crockett?

Q. Yes. A. On October 30th?

Q. Yes. A. Yes.

Q. What time was that?

A. The first time I called Mr. Crockett was rather early in the morning and I advised him that he was to come to Monroe to have a conference with myself.

(Testimony of Wayne R. Giesy.)

* * * * *

Q. Did he come to Monroe? Did you talk to him at Monroe on October 30th?

A. Yes, I did.

Q. What was that conversation, as well as you remember it?

A. Well, the conversation entirely took up the financial report that I had received, and a discussion with him as to what I would do as far as operating the plant. At that time, I advised him that it would be necessary that I discontinue it until we discovered what items we were doing that paid us properly, and what items we would have to discontinue, and it was planned at that time to work as vigorously as possible through the weekend to discover just what operation we would run, if any, the following week. [359]

Q. Did you at any time authorize Claude Turner to talk to the men about union activities?

A. I at no time authorized Claude Turner to talk pro or con regarding union activities with the men.

* * * * *

Redirect Examination

Q. (By Mr. Masters): Have you ever tested samples of cleaning done by Mr. Sams?

A. Yes. I have directed Mr. Crockett to go to the cleaner and acquire samples for me of the cleaned seed, the product of Mr. Sams' work.

* * * * *

(Testimony of Wayne R. Giesy.)

Q. What was the result of those tests?

A. They were not satisfactory.

Mr. Masters: That's all.

Recross Examination

Q. (By Mr. McIntyre): Did you tell Mr. Sams that they were not satisfactory?

A. Yes, and I also mentioned how to set the cleaner to make them satisfactory.

Q. And you yourself talked to Mr. Sams?

A. I participated in that conversation once, and I advised Mr. Crockett on other occasions.

Q. Did you advise Mr. Sams?

A. I advised Mr. Sams directly once.

Q. And when was that?

A. That would have been in August or September of '53.

Q. And where was it done?

A. It was done in the Monroe Feed Store, Avery Lane, Corvallis plant. [382]

* * * * *

Q. So, you told Mr. Sams then some time during August or September about this? A. Yes.

Q. Did you remove him from the operation?

A. I thought that he would respond to the corrections, which it's obvious that he didn't.

Q. It was obvious as of when?

A. As of the time the official report was returned from the seed analyst.

(Testimony of Wayne R. Giesy.)

Q. You mean there was another test made?

A. Yes.

Q. And what test was this one?

A. That was an official seed analysis. [384]

* * * * *

Mr. Masters: Will you mark these documents, please?

(Thereupon the documents above referred to were marked Respondent's Exhibits Nos. 3, 4, 5 and 6 for identification.)

Mr. Masters: I have exhibits, Respondent's 3, 4, 5 and 6, in duplicate, which are letters from myself to Mr. Bailey which I would ask Mr. Bailey to stipulate that they would be admissible at this time.

Mr. Bailey: I have no objection. [391]

* * * * *

Trial Examiner: All right. Now, is there objection to their receipt?

Mr. McIntyre: No, I have no objection.

Trial Examiner: Do you, Mr. Bailey?

Mr. Bailey: I have no objection. [392]

Trial Examiner: They will be received.

(The documents heretofore marked Respondent's Exhibits Nos. 3, 4, 5 and 6, for identification, were received in evidence.)

RESPONDENT'S EXHIBIT No. 3

[Letterhead of Masters and Masters]

Mr. Paul T. Bailey

December 7, 1953

Attorney at Law

1207 S. W. Third Avenue, Portland 4 Oregon

Re: Monroe Feed & Seed Co.

Case No. 36-CA-434

Dear Mr. Bailey:

I note in your letter of November 20, 1953, addressed to me, requesting that I recognize the Grain Millers' Local 61, in connection with the representation of the employees of Monroe Feed & Seed Company, that you refer to a case number.

Inasmuch as this raises a certain amount of doubt as to your claim of representation, I would appreciate having you inform me whether you claim to represent a majority of the employees now employed by Monroe Feed & Seed Company or whether you only claim to represent a majority of those employees named in the charge filed in Case No. 36-CA-434. Do you also claim to represent the office and clerical employees of Monroe Feed & Seed Company as well as those employees engaged in the processing and hauling?

Yours very truly,

Masters & Masters

/s/ By W. Masters

WJM:b

(Copy)

RESPONDENT'S EXHIBIT No. 4

[Letterhead of Masters and Masters]

Mr. Paul T. Bailey

February 10, 1954

Attorney at Law

Madison Building, Portland 4, Oregon

Re: Monroe Feed Store and American Federation of Grain Millers, No. 61, Case No. 36-CA-434.

Dear Mr. Bailey:

I received your letter of February 9, 1954, wherein you demand that Monroe Feed Store recognize the American Federation of Grain Millers, Local 61, as bargaining agent for certain employees of the Company. As expressed in my letter of December 7, 1953, the Company does not feel that this union represents a majority of its employees. For this reason, the Company does now request that you enter into a consent election agreement so that an election may be held immediately before the National Labor Relations Board to determine this question of representation.

In the event that this election proves that this union does represent a majority of the employees, the Company will be happy to enter into negotiations with a view of reaching a satisfactory collective bargaining agreement.

A charge has been filed by this union, claiming that the Company has discriminatorily discharged employees because of union activities, and a complaint has been issued based upon this charge, and a hearing has been set upon this complaint. The

company has not discharged any employees because of union activities, and has not refused to rehire any employees because of union activities. Employees have been rehired on a merit basis.

If you have objections to an election, I would appreciate being informed so that a petition for an election may be filed by the employer in order to determine the question concerning representation which is now present.

Yours very truly,

Masters & Masters,

/s/ By W. Masters

WJM:b

(Copy)

RESPONDENT'S EXHIBIT No. 5

[Letterhead of Masters and Masters]

Mr. Paul T. Bailey

February 15, 1954

Attorney at Law

1207 S. W. Third Avenue, Portland, Oregon

Re: Monroe Feed Store

Dear Mr. Bailey:

It is my understanding from your letter of February 11, 1954, that you do not wish to enter into a consent election and you do not wish to discuss an election in any manner.

It is also my understanding that you now take the position that all employees discharged were discharged because of union activities. This indicates that you no longer feel that you represent a majority of the present employees of Monroe Feed

Store, and therefore, do not wish to participate in an election.

Inasmuch as you do not represent a majority of the employees, the employer does not desire to enter into collective bargaining with the Local.

Yours very truly,

Masters & Masters,

/s/ By W. Masters

WJM:b

(Copy)

RESPONDENT'S EXHIBIT No. 6

[Letterhead of Masters and Masters]

Mr. Paul T. Bailey

February 18, 1954

Attorney at Law

1207 S. W. Third Avenue, Portland, Oregon

Re: Monroe Feed Store and American Federation of Grain Millers

Dear Mr. Bailey:

I have your last letter and I note that you claim that the Union represents a majority of the employees at Monroe Feed Store. However, I further note that you do not desire to test this majority by an election. Inasmuch as the management of Monroe Feed Store does not feel that the union represents a majority of their employees, the employer feels that it would be a violation of the Act to enter into any agreement with the Union requiring its employees to become members of the Union.

If and when this question of representation is determined and if the Union is the bargaining agent for a majority of the employees, the Monroe Feed

Store will be willing to enter into negotiations with a view of reaching a satisfactory collective bargaining agreement. In the meantime, I can assure you that the company is in no way discriminating against its employees because of union activities, nor is the Company interfering with, restraining or coercing its employees in the exercise of any of the rights guaranteed by the National Labor Relations Act, but, to the contrary, is attempting to refrain from any restraint or coercion in regard to the employees' rights to either join or refuse to join a labor organization.

Yours very truly,

Masters & Masters

/s/ By W. Masters

WJM:b

(Copy)

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 19th Region in the matter of Monroe Feed Store and American Federation of Grain Millers, Local 61, AFL, Case No. 36-CA-434, March 9-10, 1954, Corvallis, Oregon, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters

/s/ By M. J. MONTGOMERY,
Field Reporter

No. 15047

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONROE FEED STORE, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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MARCEL MALLET-PREVOST,
Assistant General Counsel,
ARNOLD ORDMAN,
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Attorneys,
National Labor Relations Board.

FILED

JUL 10 1956

PAUL P. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15047

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONROE FEED STORE, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon a petition of the National Labor Relations Board for enforcement of its order issued against respondent on October 29, 1954, pursuant to Section 10 (c) of the National Labor Relations Act as amended, herein called the Act.¹ The Board's decision and order (R. 35-40)² are reported in 110 NLRB 630. This Court has jurisdiction of the case, the unfair labor practices having occurred in

¹ 61 Stat. 136, 29 U.S.C., Section 151, *et seq.* The relevant statutory provisions appear in the appendix, *infra*, pp. 14-16.

² References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

Monroe and Corvallis, Oregon, within this judicial circuit.³

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Briefly stated, the Board found, in agreement with the Trial Examiner, that respondent violated Section 8 (a) (1) of the Act by threatening and interrogating its employees with respect to union activities and by discharging certain of its employees with the purpose of interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act; and that respondent violated Section 8 (a) (5) and (1) of the Act by failing and refusing to bargain collectively with the exclusive bargaining representative of its employees and by granting unilateral wage increases. The evidence upon which the Board based its conclusions is summarized below:

The unfair labor practices

1. Interference, restraint and coercion

Respondent operates two plants, one in Monroe, Oregon and one in Corvallis, Oregon (R. 10-11; 57). Wayne Giesy was at all times here material general

³ Respondent, a corporation, operates two plants in Oregon where it buys, processes, and sells feed, grain, fertilizer and seed. At the direction of E. F. Burlingham & Sons, which owns a substantial amount of respondent's stock as well as a substantial interest in other seed and feed companies, respondent during the year preceding the Board hearing shipped at least \$72,000 worth of seed directly to customers outside the State of Oregon (R. 10-11, 17; 57-58, 62-70, 191-192). On these facts alone the Board's assertion of jurisdiction was plainly proper. *Wayside Press, Inc. v. N.L.R.B.*, 206 F. 2d 862, 864 (C.A. 9); *Sam Zall v. N.L.R.B.*, 202 F. 2d 499, 500 (C.A. 9); *Jonesboro Grain Drying Cooperative*, 110 NLRB 481.

manager of both plants and a director of respondent corporation (R. 11-12; 57). David Crockett, deceased at the time of the Board hearing, was assistant manager in charge of the Corvallis operation (R. 12; 93).

On October 27, 1953, six of respondent's employees met at the home of employee Webster Sams with Austin Stevens, business agent for the American Federation of Grain Millers, Local 61, AFL, herein called the Union (R. 12; 132-133, 147). At this gathering and on the next day 12 of the 13 employees who comprise an appropriate unit covering respondent's two operations signed cards designating the Union as their collective bargaining representative (R. 12, 14; 132-134, 147, 154-155).

On October 28, 1953, the day after the meeting, Assistant Manager Crockett was informed by an unidentified person that a union meeting had been held at Sams' house (R. 12; 94-95). Crockett that afternoon questioned Sams as to the accuracy of this information and Sams admitted that a meeting was held in his house and that they "had a union in there" (R. 12; 149-150). Following this conversation or on the next day, Crockett reported the matter to General Manager Giesy (R. 12; 94-95). According to Giesy, however, Crockett reported to him that a meeting had been held but assured Giesy that the meeting did not concern a union (*ibid.*).⁴ Although professedly accepting this assurance, Giesy early in the afternoon of October 30 questioned employee Kenneth Mumford as to who was at the "union meeting" (R. 12-13; 138-139). Mum-

⁴ Respondent sought to buttress Giesy's testimony by proffering in evidence an affidavit (Resp. Ex. 2) executed by Crockett some time before his death. The Trial Examiner excluded the affidavit, a copy of which is included in the certified record as a rejected exhibit.

ford acknowledged that he had been at the meeting and that all of the employees present had signed authorization cards (*ibid.*).⁵

That same afternoon, respondent's foreman, Turner told employee Frank Harrington that he had overheard a conversation between Crockett and Giesy concerning the employees' efforts "to get a union in the mill" (R. 15; 156). When Harrington asked Turner what he supposed would happen, Turner answered, "Well, Wayne [Giesy] will just find out who started it and will fire him. That's what happened the other time" (R. 15; 156). In similar vein, Turner had told employee Johnson about a month earlier that Giesy would fire everyone who joined a union (R. 15; 152-153).

At the close of business on October 30, Giesy without giving any advance notice discharged all of the employees at Monroe with the exception of his father and the bookkeeper (R. 12; 97-99). At the same time Crockett at Giesy's direction discharged all the employees at Corvallis, also without giving advance notice (R. 12; 108-110). Three days later, on November 2, as more fully discussed, *infra*, Giesy rejected a bargaining request by the Union on the ground that respondent had no employees.

That very day, however, respondent started to rehire and within a few months restored its normal working

⁵ The findings as to this incident were based on Mumford's credited testimony. Eight months after the Board's decision and order and some fifteen months after Mumford had testified, respondent moved that the Board reopen the case on the basis of a terse affidavit by Mumford which was dated a few weeks earlier and which stated that there was "not any mention of Union" in his conversation with Giesy. The Board denied the motion for the reason that it presented inadequate ground to warrant reconsideration of its decision and order. See discussion, *infra*, pp. 7-8.

complement (R. 13-14; 80-82, 102-110). Several of the employees discharged on October 30 were not rehired, however (R. 20-21; 102-110, 164-166, 167-169). Moreover, Giesy did not discontinue his interest in the Union. On November 2, Giesy asked employee Cook whether he was a member of the Union (R. 13; 178-179), and some time thereafter in a conversation with employees Frank and Don Harrington, Giesy observed that "I'm going to have to put some of these men back to work and I'm going to lose money by it, but . . . before I go Union, I'll shoot myself right between the eyes" (R. 15-16, 21; 160, 164).

Upon the foregoing facts the Board found that respondent by interrogating its employees as to their union activities and by threatening them with the drastic consequences if they joined the Union interfered with, restrained, and coerced them in the exercise of rights guaranteed by Section 7 of the Act thereby violating Section 8 (a) (1) (R. 26). The Board found a further unlawful interference in the October 30 mass discharge immediately after respondent learned of its employees' union activities (R. 26). In this connection the Board rejected as unsupported by the record respondent's claim that the discharges were necessitated by respondent's poor financial condition (R. 18-19).

2. The refusal to bargain and the unilateral wage increase

Twelve of the thirteen employees comprising an appropriate unit having signed cards designating the Union as their bargaining representative (*supra*, p. 3), Union representatives Austin Stevens and Claude Schaeffer visited Giesy at the Monroe plant on No-

vember 2, 1954, informed him that the Union represented a majority of the employees, and asked for collective bargaining negotiations (R. 13; 87-90, 129-130, 134-135).⁶ Giesy rejected the request with the curt observation that as of the night of October 30, respondent had no employees and that therefore there was "no problem" (*ibid.*).

After resuming operations, however, respondent, without consulting the Union and in the face of its claim of poor financial condition, increased the hourly pay of each of its employees by approximately 30 cents (R. 18; 105, 114, 118-119).⁷

The Board found that the Union on October 30, and at all times thereafter, represented a majority of respondent's employees in an appropriate unit (R. 14). The Board concluded that by refusing on November 2 to bargain with the Union pursuant to its request and by unilaterally granting the employees wage increases thereafter without consulting the Union, respondent violated Section 8 (a) (5) and (1) of the Act (R. 25-26).

II. The Board's Order

Pursuant to the foregoing findings the Board ordered respondent to cease and desist from engaging in the unfair labor practices found and from interfering in any other manner with the Section 7 rights of its employees (R. 36-37). Affirmatively, the Board, in addition to ordering the posting of appropriate notices, directed respondent to reinstate, in instances where it had not already done so, the employees discharged on

⁶ Giesy admitted that on October 31, he was told by employee Cantrell, Sr., that a majority of the employees had signed Union cards (R. 215-216).

⁷ Supervisors also received substantial salary increases (R. 119),

October 30,⁸ to make all the October 30 discharges whole for earnings lost as a result of the discrimination, and to bargain collectively with the Union upon request (R. 37-38, 24-25).

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports The Board's Finding that Respondent Violated Section 8(a)(1) of the Act By Interrogating and Threatening Its Employees Concerning Their Union Activities and By Discharging Them Because of Those Activities

A. The interrogation and threats

The evidence summarized above establishes that respondent immediately upon learning of its employees' desire for union representation interrogated employees concerning their union membership and threatened to discharge them. Such conduct engaged in by Foreman Turner, Assistant Manager Crockett, and General Manager Giesy plainly constituted unlawful interference interdicted by Section 8 (a) (1) of the Act. See *N.L.R.B. v. Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C.A. 9).

Respondent's claim that it should not be held answerable for Turner's threats is devoid of merit because Turner's supervisory status is clearly established (R. 80) and because Turner's threats directly reflected the views of his superior, General Manager Wayne Giesy. Respondent's reliance on Mumford's belated affidavit (*supra*, p. 4, n. 5) to rebut the latter's testimony concerning his conversation with Giesy and on that ground to reopen the hearing is likewise devoid of merit. There is no showing that the information

⁸ For reasons discussed, *infra*, pp. 12-13, the Board rejected respondent's claim that employee Joyner's conduct subsequent to his unlawful discharge disqualified him for reinstatement (R. 22-23).

contained in Mumford's affidavit, drawn more than a year after he had testified, was not available at the time of the hearing. Moreover, even accepting the terse affidavit at face value, the fact that the word "Union" was not mentioned in the course of the conversation would not detract from the remainder of the testimony which established that Giesy interrogated Mumford concerning the events at the employee meeting. Under these circumstances the Board's refusal to reopen the hearing to reconsider its earlier evidentiary determination was within its allowable discretion. Cf. *N.L.R.B. v. Osbrink*, 218 F. 2d 341, 344-345 (C.A. 9), certiorari denied, 349 U. S. 928.⁹

B. *The mass discharge*

Three days after learning of the Union's organizational campaign and the employees' favorable disposition toward the Union, respondent with no advance notice precipitately discharged virtually all of its employees in both Monroe and Corvallis. The Board found that this action was taken to frustrate the unionization of its employees and was therefore violative of Section 8 (a) (1) of the Act (R. 18-19).¹⁰ Respondent

⁹ Even more vulnerable is respondent's claim, advanced for the first time in its Statement of Points to this Court that the Trial Examiner erred in rejecting Crockett's affidavit (*supra*, p. 3, n. 4). Respondent's failure to urge this objection before the Board—a failure it in no way explains—precludes it from urging that objection here. Section 10(e) of the Act. *N.L.R.B. v. Noroian*, 193 F. 2d 172, 173 (C.A. 9). Moreover, the Trial Examiner's ruling follows settled evidentiary canons. *Wigmore on Evidence*, 3rd ed. §§ 1384, 1395. Finally, the affidavit even if accepted and credited would not invalidate the Board's unfair labor practice findings which are independently supported in the record.

¹⁰ The complaint did not allege the discharge to be violative of Section 8 (a) (3) and the Board made no finding in that regard. On settled authority, however, "Orders of reinstatement and back

controverts this conclusion claiming that the discharges were motivated by economic considerations.

Of course, an employer may with impunity curtail his operations and discharge employees for any reason unrelated to union and other concerted activities protected by the Act. However, curtailment of operations or the discharge of employees for the purpose of interfering with legitimate union or organizational activities plainly deprives employees of rights guaranteed them by Section 7 contrary to the Section 8 (a) (1) prohibition. We submit that the Board could reasonably find, as it did, that the discharges here were of the latter variety.

First, as already shown (p. 4), the discharges took place almost immediately after respondent learned of its employees' desire for union representation and were consistent with respondent's antecedent threats of reprisal for union organization. In addition, the discharges served the purpose of destroying, in respondent's view, any basis for a Union claim for recognition. Indeed, respondent utilized the discharges as a ground for rejecting the Union's November 2 bargaining request even though on that very day it had started to restaff its plant and was rehiring a number of the employees it had released only three days earlier. Further indication that the discharges were an anti-union stratagem and were not prompted by genuine economic considerations is afforded by the fact that after resuming operations respondent put into effect hourly wage increases with the purpose, as the Board found

pay are as much entitled to be made for discharges constituting violations of Section 8 (a) (1) as for those violative of Section 8 (a) (3)." *N.L.R.B. v. J. I. Case Co.*, 198 F. 2d 919, 924 (C.A. 8), certiorari denied, 345 U.S. 917. Accord: *N.L.R.B. v. Reed*, 206 F. 2d 184, 189-191 (C.A. 9).

(R. 22), of further discouraging union adherence. See *N.L.R.B. v. Grant*, 199 F. 2d 711, 712 C.A. 9), certiorari denied, 344 U. S. 928. In sum, the discharge of the employees on October 30 was part of respondent's over-all effort to forestall union organization and collective bargaining which respondent manifestly opposed.

This conclusion is "strengthened by the fact that the explanation of the discharge offered by the respondent fails to stand under scrutiny." *N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9). Contrary to respondent's claim that its economic situation prompted the precipitate discharges of October 30, the record shows that respondent had a general knowledge of its poor financial condition long before, yet at no time prior to the advent of the Union had it discharged employees (R. 111, 183-185, 187-193).¹¹ And, as already suggested, the grant of wage increases hardly squares with the claim that an economic pinch necessitated the earlier discharges. Respondent's true motivation in this regard is better shown, we submit, by Giesy's statement that "I'm going to have to put some of these men back to work and I'm going to lose money by it, but . . . before I go Union, I'll shoot myself right between the eyes" (*supra*, p. 5).¹²

¹¹ As already noted (p. 2, n. 3), E. F. Burlingham & Sons owns a substantial interest in respondent corporation and purchases much of its output. Burlingham's accountant, who also handles respondent's financial statements, testified that other seed and feed companies in which Burlingham had an interest operated at a loss but did not find it necessary to reduce their employee complement (R. 191-193).

¹² Although respondent's operations were on a somewhat reduced scale for some time after the October 30 discharges, this consequence, as the Board found (R. 21-22) flowed from and was part of respondent's overall "plan to defeat the employees' desires for representation." In any event, respondent may not now claim exoneration from liability for a situation brought about by its earlier unlawful conduct.

II. Substantial Evidence On the Record as a Whole Supports the Board's Finding that Respondent Violated Section 8 (a) (5) of the Act

The obligation of an employer to bargain collectively with a representative designated by a majority of his employees in an appropriate unit is expressly set forth in Sections 8 (a) (5) and 9 (a) of the Act. In the instant case respondent does not question the Board's finding that the unit which the Union sought to represent is appropriate. And when the Union demanded recognition on November 2, 1953, respondent did not challenge the Union's majority status which was clearly established by the record (*supra*, p. 3).¹³ Giesy merely stated that as respondent had no employees, a situation brought about by its own unlawful discharges, there was "no problem." Respondent, however, already knew at this time that virtually all the employees whom it had discharged had designated the Union as their bargaining representative and under the explicit terms of Section 2 (3) of the Act, these individuals "whose work had ceased as a consequence of . . . [an] unfair labor practice" retained their status as employees for purposes of the Act. Under these circumstances, the refusal to bargain was violative of the Act and respondent's continued efforts to undermine the Union only aggravated that violation. *N.L.R.B. v. Trimfit, supra*; *N.L.R.B. v. Parma Water Lifter Company*, 211 F. 2d 258 (C.A. 9), certiorari denied, 348 U. S.

¹³ Respondent first challenged the Union's majority status and requested a consent election on February 10, 1954, after the complaint had issued in the instant proceeding and after respondent had engaged in the unfair labor practices herein set forth. This Court has held that by such conduct, so timed, an employer may not relieve itself of its obligation to bargain. *N.L.R.B. v. Trimfit of California, Inc.*, 211 F. 2d 206, 210.

829; *N.L.R.B. v. Geigy Company, Inc.*, 211 F. 2d 553, 556 (C.A. 9), certiorari denied 348 U. S. 821.

Apart from the foregoing, respondent independently violated Section 8 (a) (5) of the Act by granting general wage increases to the employees in the appropriate unit without consulting the Union. As part of his obligation to bargain an employer must notify the collective bargaining representative of its employees of any contemplated changes in the terms and conditions of employment in order to give that representative an opportunity to bargain with respect to such changes. *N.L.R.B. v. Crompton Highland Mills*, 337 U.S. 217, 225; *May Dept. Store Co. v. N.L.R.B.*, 326 U.S. 376, 384; *N.L.R.B. v. Parma, supra*.

III. The Board's Order Is Valid and Proper

The Board's order embodies the customary provisions appropriate to remedy violations such as those here found. Respondent, however, challenges the propriety of that order insofar as it directs reinstatement and back pay for employee Joyner. In respondent's view Joyner disqualified himself for such remedy by reason of certain misconduct in which he engaged after his discharge.

Joyner was a 17-year-old high school student who prior to his unlawful discharge on October 30, 1953 had worked regularly for respondent on a part-time basis (R. 18; 168-169). In December 1953 Joyner requested Giesy to reemploy him. Giesy refused to reemploy Joyner, the latter was aggrieved at the refusal, and the conversation became heated (R. 169, 213-214). At one point Joyner invited Giesy "outside" for a fight, but Giesy declined on the ground that he would not fight a 17 year old boy "under any consideration" (*ibid.*).

The Trial Examiner, whose findings the Board adopted, concluded that while Joyner's conduct was not to be condoned, "this unpleasant occurrence took place in a setting where Joyner justifiably believed that he was being discriminatorily deprived of his job" (R. 22-23). In the Board's view (*ibid.*) the fact that Joyner, a high school boy, did not have a sense of restraint equal to the stress laid upon it at this time ought not to disqualify him from the remedy of reinstatement and back pay which on the basis of respondent's earlier and unprovoked treatment of Joyner was plainly appropriate.

Particularly because of Joyner's youth, it may be observed here as it was in *N.L.R.B. v. Efco Mfg. Co.*, 227 F. 2d 675, 676 (C.A. 1), certiorari denied, 350 U.S. 1007 where an analogous contention was advanced and rejected, "we have no such case as where an employee puts his employer in direct fear of an imminent beating. We have only a display of insolence . . ." In the context of this case, as in *Efco*, no adequate ground is shown for withholding the remedial provisions of the Act.

CONCLUSION

Accordingly, it is respectfully submitted that the Board's order should be enforced in full.

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JULY, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 301, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the

purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

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No. 15047

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MONROE FEED STORE,
Respondent.

BRIEF FOR MONROE FEED STORE

*On Petition for Enforcement and Petition for Review of
Order of the National Labor Relations Board.*

FILED

AUG 10 1956

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Respondent.

BRIEF FOR MONROE FEED STORE

*On Petition for Enforcement and Petition for Review of
Order of the National Labor Relations Board.*

STATEMENT OF CASE

The Board found that respondent violated Section 8(a)(1) of the Act by threatening and interrogating its employees with respect to union activities and by discharging certain of its employees, and that respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and by granting unilateral wage increases.

The Board ordered that respondent cease and desist from interrogating employees or interfering with em-

ployees, in violation of the Act and to cease and desist from refusing to bargain collectively. The Board further ordered that respondent offer to all its employees who were discharged on October 30, 1953, immediate and full reinstatement to their former or substantially equivalent position without prejudice to their seniority or other rights or privileges and that respondent make all such employees whole for any loss of earnings they may have suffered from October 30, 1953, to the date of rehire or offer of reinstatement, and the Board further ordered that respondent, upon request, bargain with the American Federation of Grain Millers, Local 61, AFL. This proceeding raises the question of whether or not the findings of the Board with respect to questions of fact and the conclusions of law based thereon are supported by substantial evidence on the record considered as a whole, and the question of whether or not the decision and order of the NLRB is reasonably designed to effectuate the policies of the NLRA. These matters were argued before the NLRB through respondent's exceptions to the Intermediate Report and Recommended Order of the Trial Examiner, and are raised in this Court under Section 10(e) and 10(f) of the NLRA as amended.

During the hearing upon the complaint, the Trial Examiner rejected as incompetent an offer by respondent to introduce into evidence an affidavit of one, David Crockett, deceased, taken by a Field Examiner for the NLRB prior to the hearing upon the complaint. This witness was deceased, the evidence in the affidavit was material, no reason was given for its rejection, and the

rejection of this affidavit raises the question as to whether or not respondent was denied due process of law by reason of the bias and prejudice of the Trial Examiner in rejecting the affidavit as evidence.

Subsequent to the decision and order of the NLRB, respondent filed a motion with the NLRB for an order modifying or setting aside the findings, conclusions and recommendations of the Trial Examiner and Order of the Board or in the alternative, for an order reopening the hearing for the receipt of further testimony. These motions were denied by the Board, raising the question of whether or not the board acted arbitrarily, and capriciously, and abused their discretion, thereby denying due process of law to respondent by denying respondent's motion.

SPECIFICATION OF ERROR I

The Board erred in finding that respondent violated Section 8(a)(1) of the Act by threatening and interrogating its employees with respect to union activity, and by discharging certain of its employees with the purpose of interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

ARGUMENT

Section 10(e) and Section 10(f) of the National Labor Relations Act, as amended, state that the findings of the Board with respect to question of fact *if sup-*

ported by substantial evidence on the record considered as a whole, shall be conclusive. Prior to the amendments of 1947, the law provided that the Board's factual findings were conclusive if supported by evidence. The U. S. Supreme Court had interpreted the prior law as meaning substantial evidence which was deemed to mean more than a mere scintilla and to encompass such relevant evidence as the reasonable mind might accept as adequate to support a conclusion. In adopting the 1947 amendment, the Senate committee, in discussing the 1947 amendment recognized the U. S. Supreme Court construction of the meaning of the Act to the effect that substantial evidence was required but then stated:

“Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the Courts not to disturb the Board's findings. . . .” Senate Report 105, 80th Congress, pp. 26, 27.

Reviewing Courts are permitted to set aside the NLRB decisions when they cannot conscientiously find that evidence supporting it is substantial when viewed in the light of the entire record including opposing evidence. *Universal Camera Corp. v. NLRB*, 1951, 340 US 474, 91 Sup Ct 456, 95 L ed 456. Conflicting evidence or evidence from which different inferences may be drawn must be considered by the reviewing court. The fact that the Board's findings of fact are supported by evidence “substantial” to justify them apart from the conflicting evidence does not make the findings conclusive. The conflicting evidence must also be considered by the reviewing court. The entire record must be considered to determine if the evidence relied upon by the Board

is substantial when viewed in its setting in the entire record, considering the inferences to be drawn from opposing evidence. Reviewing courts have often found a lack of substantial evidence on consideration of the record as a whole and have denied enforcement of the Board orders. *NLRB v. Eanet*, 1949, 179 Fed 2d 15, C of A, DC; *NLRB v. Houston Chronicle Publishing Co.*, 1954, 211 Fed 2d 848, C of A 5th, 25 Lab Cas Para 68,-305; *NLRB v. Russell Mfg. Co.*, 1951, 191 Fed 2d 358, C of A 5th Cir, 20 Lab Cas Para 66,529; *NLRB v. Gala-Mo Arts*, 232 Fed 2d 102, C of A 8th Cir, Lab Cas Para 69,916 (Reinstatement and back pay); *NLRB v. McGahey*, C of A 5th, 30 Lab Cas Para 69,974; *Pacific Gamble Robinson Co. v. NLRB*, 1950, 186 Fed 2d 106, C of A 6th Cir, 19 Lab Cas Para 66,100; *John S. Barnes Corp. v. NLRB*, 1951, 190 Fed 2d 127, Ct of A 7th Cir, 20 Lab Cas Para 66,412.

Section 10(c) of the NLRA as amended provides that orders regarding unfair labor practices shall issue “if upon the preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice . . .” The joint conference report, in discussing the preponderance test, states: “The conference agreement provides that the Board shall act only on the preponderance of the testimony—that is to say, on the weight of the credible evidence.” “Again, the Board’s decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving

that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurable increased respect for decisions of the Board should result from this provision." Conference Report, House Report 510, 80th Congress, pp. 53, 54. The Courts are under a duty to see that the Board does not infer facts that are not supported by evidence or that are not consistent with evidence in the record and that it does not concentrate on one element of proof to the exclusion of others, without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. "This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact . . . will very materially broaden the scope of the Court's reviewing power." Conference Report, House Report 510, 80th Congress, pp. 55, 56.

Monroe Feed Store, therefore, proceeds to an examination of the record as a whole to determine if the testimony and evidence cited by the Board in its brief is substantial when considered in the light of opposing evidence.

The Board relies upon testimony that Crockett questioned Sams on the afternoon of October 28, regarding information he had received that there had been a meeting at Sams' house and that they "had a union in there" (Tr. 12, 149-150). David Crockett was deceased at the time of the Board hearing. He was assistant manager in charge of the Corvallis operation (Tr. 12, 93). The NLRB had the affidavit of David Crockett which was given at Corvallis, Oregon, to Arthur J. Hedges, Field Examiner for the 36th Sub-region on November 20,

1953. This affidavit was offered in evidence by respondent and rejected (Tr. 196-198). In the affidavit, Crockett states that Sams came up to Crockett and said "that the meeting was in his house in Belfountain and that it was just a get-together among a few of the boys, and that there was no union man there at all." Crockett reported this matter to General Manager Geisy (Tr. 94-95). Geisy testified that Crockett had reported this matter to him and had stated that there had been a meeting, but assured Geisy that the meeting did not concern a union (Tr. 94). Geisy dismissed the conversation as having nothing to do with union organization as he had no reason to believe otherwise (Tr. 94). The Board then relies upon testimony of Kenneth Mumford that Geisy asked him who was at the union meeting, and Mumford's reply that he was there and that they all had signed union cards (Tr. 12, 13, 138-139). After the hearing, however, Kenneth Mumford executed an affidavit before a Notary Public concerning this conversation, stating "There was not any mention of union or was union brought into the conversation." (See respondent's affidavit in support of motion for leave to adduce additional evidence.) This affidavit certainly raises great doubt about whether the testimony of Kenneth Mumford was substantial evidence or not and should be inquired into. Substantiating the affidavit signed by Mumford is the testimony of June Urbach, the bookkeeper, concerning this October 30th conversation. She testified that Mumford said "we sure had a meeting out at Sams' last night," and "We had a good get-together," She specifically denied that the word "union" or the word "organization" or anything similar was used in this conversation between

Mumford and Geisy (Tr. 195). Also substantiating this testimony is testimony of Wayne Geisy concerning this conversation. Mr. Geisy testified that Mumford did not tell him that there had been a union meeting or any union activity. He testified that Mumford told him that a group of the employees had a get-together some evening prior to that time at Webster Sams' place and had had a good time (Tr. 217).

The Board relies on testimony concerning conversations between Claude Turner and Frank Harrington on October 30 (Tr. 12) to the effect that Harrington told Turner they were 100 per union. This knowledge by Turner is used by the Board to support findings that the discharges were discriminatory because knowledge of a foreman is imputed to the corporation manager, Geisy (Tr. 12). This is shown to be a shot gun approach because the Board relies on this same conversation between Turner and Harrington on October 30 to support the finding that Geisy and Crockett already knew about the union activities because Turner told Harrington that he, Turner, thought someone was trying to get a union in the mill (Tr. 156). Frank Harrington testified that Turner had told him that he had overheard a conversation between Crockett and Geisy (Tr. 156). Monroe Feed Store seeks the opportunity to take testimony of Claude Turner concerning these events, or in the alternative, to introduce in evidence the affidavit of Claude Turner, given to Arthur Hedges, Field Examiner of the NLRB, on November 19, 1953, at Monroe, Oregon, concerning this conversation wherein Turner stated that he asked Frank Harrington about the men huddling

together in groups on October 30, and that Frank Harrington told Claude Turner that they had all signed cards for the union. Turner's affidavit states that Harrington asked him not to say anything about it so he didn't. He further states that he did not say anything to Mr. Geisy about it, nor to anyone else. The affidavit further states that he and Harrington did not discuss David Crockett being in the office and that he did not recall whether Crockett was there that day or not. He further states that he did not tell Harrington anything about overhearing a conversation between Crockett and Geisy, nor did he tell Geisy that he thought that someone was trying to get a union in the mill. This affidavit of Claude Turner completely refutes the testimony of Frank Harrington. This affidavit was taken in November, 1953, prior to the hearing, and is not self-serving. The affidavit was given less than thirty days after the discharges to a Field Examiner of the Board. The statement of General Counsel for the NLRB (NLRB Brief, p. 4) "That same afternoon, Respondent's foreman, Turner, told employee Frank Harrington that he had overheard a conversation between Crockett and Geisy concerning the employees' efforts to get a union in the mill, Tr. 15, 156," does not clearly state the evidence on this matter. This was not a conversation between Crockett and Geisy concerning efforts to get a union in the mill. This was a conversation between Harrington and Turner, in which Turner told Harrington that he, Turner, had concluded that he thought someone was trying to get a union in the mill (Tr. 156). Harrington further testified that Turner said to him that he, Turner, only caught a little of the conversation between Crockett and

Geisy (Tr. 156). The statement of General Counsel that this was the conversation between Crockett and Geisy concerning the employees' efforts to get a union into the mill doesn't reflect the true testimony, which was testimony of Harrington that Turner told him "I think someone is trying to get a union in the mill." Harrington did *not* testify that Turner told him that Turner overheard Geisy and Crockett discussing union organization. If one wishes to speculate it would be as reasonable to speculate that Turner formed this opinion from the actions of the employees huddling in groups. There was a conversation between Crockett and Geisy about the meeting at Belfountain and discussions with Sams. This was a telephone conversation on October 28 (Tr. 199).

On October 30, Crockett came to the mill at Monroe and had a conference with Geisy at which time checks were made out to pay the men off at the end of the day. Geisy notified Crockett at that time that the auditors had notified him they were losing money and he was therefore going to lay the men off (Tr. 199). Conclusions of Turner communicated to Harrington are not evidence of knowledge of Geisy of the union activities.

The alleged statement of Geisy which Geisy denies, that "Before I go union, I'll shoot myself right between the eyes" (Tr. 160, 164) was allegedly made long after the discharges and after Geisy had rehired the union employees and after a charge and complaint were filed. This is little evidence that he interfered with his employees' right at an earlier period prior to the charges and NLRB complaint.

SPECIFICATION OF ERROR II

The Board erred in failing to find that the discharges were motivated by economic consideration.

ARGUMENT

The Board rejected as unsupported by the record respondent's claim that the discharges were necessitated by respondent's poor financial condition (Tr. 18, 19). The Trial Examiner, in his Intermediate Report and Recommended Order, stated that he did not regard Geisy as a credible witness, and therefore did not accept his explanation that the terminations were necessitated and sprang from the economic considerations (Tr. 18, 19). The Trial Examiner stated that he did not credit Geisy's testimony that he first saw the profit and loss statement on October 30 (Tr. 19, 20). The Trial Examiner admits that the profit and loss statement is significant in that it shows a substantial loss (Tr. 19). The Trial Examiner concludes that Geisy knew of the profit situation sometime before October 30. Exactly what the Trial Examiner is attempting to do in this discussion is obscure as he attempts to discredit the testimony of Geisy that Geisy on a number of occasions during October, after submission of the inventory data to the auditor, was informed by the latter of the developments tending to indicate that the operation to the end of September was unprofitable (Tr. 19, 20). The Trial Examiner then states that no such conclusion could have been reached until all of the factors affecting the profitability of respondent's business had been calculated and

appraised in relation to each other (Tr. 20). The Trial Examiner then states that he does not credit Geisy's uncorroborated testimony that someone in authority over him directed that some drastic action be taken on October 30 (Tr. 20).

Point One regarding the remarks of the Trial Examiner is that whether or not Geisy had the final profit and loss statement on October 30 or on October 28 or 29 seems immaterial in regard to whether or not the discharges sprang from economic considerations and whether or not his entire testimony should be discredited. That is Geisy's testimony and his recollection and there is absolutely no evidence tending to contradict this testimony. The Trial Examiner fails to weigh the evidence or set forth reasons for believing or disbelieving evidence given by Mr. Loomis. The testimony of Mr. Loomis corroborates the testimony of Geisy (Tr. 184-194). The profit and loss statement shows that Monroe Feed Store lost \$30,000 for the period May 31, 1953, to the end of September, 1953 (Tr. 184, 186). This is an accepted fact. This is a loss of large proportions. Mr. Loomis talked to Mr. Geisy on the telephone shortly prior to October 30 concerning the figures and the profit and loss statement (Tr. 184). Mr. Loomis advised Mr. Geisy that his operation shouldn't be in the position it was in, and that the operation was unsatisfactory profit-wise (Tr. 184). In September, 1953, by reason of requests of the Bank of California, which was furnishing financing for this group of warehouses, including Monroe Feed Store, the monthly inventory system was set up. The first figures were given to the audi-

tor in September, 1953, which showed the figures reflected on the profit and loss statement, and also mill earnings. The profit and loss statement, according to Mr. Loomis, was mailed to Monroe Feed Store the latter part of October (Tr. 187). Mill earnings should be at least 50 per cent of the labor cost (Tr. 191). Mill earnings are the charge that they make for cleaning seeds, grains, or mixing of special mixes, grinding and things of that kind (Tr. 191). It is connected with profit and loss (Tr. 191). Mr. Loomis compared the mill at Amity with the mill at Monroe as far as labor costs and tonnage and the comparison showed that at Amity the mill earnings would practically balance their labor (Tr. 192). At Monroe, from May 31 to the end of September, 1953, labor cost was \$39,822.00. Mill earnings were \$10,404.00. For the month of October, labor cost was \$8,600 and mill earnings were \$3,600. In November, after the discharge, labor costs were \$3,800 and mill earnings were \$6,200. The ratio was reversed. These figures on mill earnings and labor costs show that the Monroe plant was not operating satisfactorily profit-wise and that this could be determined without knowing all the factors present in the profit and loss and statement (Tr. 187-191). In this respect, the Trial Examiner errs in his discussion wherein he discredits the testimony of Wayne Geisy (Tr. 18, 19, 20). In attempting to discredit the testimony of Geisy, the Trial Examiner failed to weigh the evidence or discuss the evidence of Mr. Loomis.

When Frank Harrington was laid off, Geisy told Harrington that his auditors had informed him that day that he was behind and that he was going to have to

make some changes and he just had to lay all the men off, and Geisy further informed him that the outgo was more than his income (Tr. 99, 157). On May 31, 1953, Monroe Feed Store closed its fiscal year and their operation had not been satisfactory profit-wise (Tr. 111). At that time, Mr. Burlingham and Mr. Loomis called to Mr. Geisy's attention their cost ratios of production against profit (Tr. 111, 112, 113). E. F. Burlingham and Sons owned a substantial amount of Monroe Feed Store stock. Mr. Loomis was the auditor for feed and seed companies in which E. F. Burlingham & Sons had an interest (Tr. 183).

Sometime in June or July, the inventory-taking system was instigated whereby inventories were taken each month (Tr. 111). This inventory was first taken at Monroe Feed Store as of September 30 (Tr. 111, 185). Periodically from October 1, to October 30, Mr. Geisy learned results of this inventory from Mr. Loomis and Mr. Burlingham (Tr. 111). Every two or three days, Mr. Geisy was given information as to how the inventory or profit and loss statement was developing (Tr. 111). Several times during October, Mr. Burlingham advised Mr. Geisy that his cost ratio between labor and production was not satisfactory (Tr. 112). In the middle of October, Mr. Geisy was advised that the inventories showed that there had to be some kind of reduction. It was advised by Mr. Loomis (Tr. 112). On October 30, Mr. Geisy first learned of the contents of the profit and loss statement and on October 30, Mr. Loomis advised Mr. Geisy to bring all of his records to Forest Grove to check every item (Tr. 112, 113). Mr. Loomis told Mr.

Geisy on October 30, that they had shown a loss for the period from their inventory for the close of the fiscal year until the inventory on September 30, and that it would necessitate some drastic changes. As a result of these conversations, Mr. Geisy decided to lay off his employees and make changes in his method of operation (Tr. 126). When the operation was terminated on October 30, Monroe Feed Store had less amounts of grain yet to clean than they had ever had entering into the winter in both operations (Tr. 120). Since October 30, the operation has changed and Monroe Feed Store is now selling more feed and less seed. They had such a small quantity to process on October 30 that during the winter months they had practically crossed off the seed-cleaning operation (Tr. 124-125). Since October 30, Monroe Feed Store has reduced the amount of retailing and wholesaling that necessitates putting the material into the 200-lb. bags, which reduces the requirements of labor, and material is now put into condition for selling in 50-ton lots and in bulk box-car loads (Tr. 125-126). Since October 30, Monroe Feed Store has made various changes to try to find an efficient operation and has operated its mixing crews on a day and a night basis, which enables production of approximately one and a half times the amount produced before rather than working two men together. This results in a more economical production. Monroe Feed Store has restricted its sales to more cash sales and less credit business, which reduces the number of 100-lb. sacks prepared for sale (Tr. 127). The clean-seed business was down 50 per cent in 1953. At Monroe, in 1952, they shipped 28 carloads of cleaned seed and only 14 carloads in 1953,

and in Corvallis, in 1952, they shipped 23 carloads of cleaned seed, and in 1953, they had only shipped 10 carloads of cleaned seed for the same period (Tr. 205). The change in the operation of this business is away from seeds and into more grains, and the backlog of seed and grain they had left to process after October 30 did not justify keeping the men on (Tr. 209). In the fall of 1952, one year before the lay-off, at Monroe they had an excess of 500 tons of mixtures of grain or seed-grain to be cleaned, and as of the time of the layoff on October 30, they had very little over 100 tons. The amounts of seed and grain that are delivered during the summer months and remain on hand in the fall, spell out the amount of time necessary to keep the strictly seasonal crew busy during the fall and winter, and if the amount on hand falls off, they do not have anything for these men to do. In this respect, Monroe Feed Store is definitely seasonable (Tr. 59). The grain receiving during the harvest is stacked up and stored away for cleaning and processing, and when that is completed they have no further work (Tr. 216). A large scalper machine has enabled Monroe Feed Store to handle the grain crops rather rapidly and put them into proper shape for shipping, resulting in a small amount of work to do during the winter period (Tr. 216-217).

After the discharges and after a survey of the operation, Mr. Geisy commenced rehiring employees and rehired many of the same employees who had been discharged (Tr. 102, 103, 104, 105, 106, 110). No discrimination was made between the employees, all of whom it is claimed were members of the labor organization.

SPECIFICATION OF ERROR III

The Board erred in finding that respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and by granting unilateral wage increases.

ARGUMENT

November 2, 1953, the union requested recognition and bargaining (Tr. 87-90, 129, 130). Mr. Geisy indicated that he had no employees at that particular time (Tr. 190). Subsequent to November 2, Monroe Feed Store rehired some of its former employees. He first hired Tom Cook, who, prior to the rehiring, told him that he had signed a union card (Tr. 102, 103). He also rehired Floyd Cantrell, Jr. (Tr. 103), Frank Harrington and Don Harrington (Tr. 104), Ellis Conn (Tr. 106), Jess Howe, Ralph Johns and Claude Turner (Tr. 110). November 20, 1953, the union, through its attorney, requested that Monroe Feed Store recognize the union. Monroe Feed Store acknowledged this letter and requested information as to which employees the union claimed to represent (Res. Ex. 3, Tr. 221). Monroe Feed Store requested that the union enter into a consent election agreement to determine the question of representation, stating that in the event the election proved the union did represent a majority of the employees, Monroe Feed Store would be happy to enter into negotiations with a view of reaching a satisfactory collective bargaining agreement (Res. Ex. 4, Tr. 222). Monroe Feed Store again wrote to the union requesting an elec-

tion and agreed to enter in negotiations with a view to reaching a satisfactory agreement in the event the union did represent a majority of the employees, and stating that the company did not feel it could enter into an agreement without a violation of the NLRA unless the union represented a majority of the employees (Res. Ex. 6, Tr. 224). There is nothing in the record to indicate a duty on the part of the employer to bargain where the employer is in doubt as to the representation of his employees. The employer may insist upon an election to determine this matter. *Artcraft Hosiery Co.*, 78 NLRB 333; *Cohoon*, 1952, 101 NLRB 966; *Puerto Rico Container Corporation*, 1950, 89 NLRB 1570; *NLRB v. Union Pacific States, Inc.*, 1938, 99 Fed 2d 1533, C of A 9th, 1 Lab Cas Para 18,240; *Robeson Cutler Co.*, 1946, 67 NLRB 481; *G. H. Holmes Co. v. NLRB*, 1950, 179 Fed 2d 876, C of A 5th, 17 Lab Cas Para 65,605.

There is no evidence that Monroe Feed Store's proposal for a consent election was made in bad faith or that Monroe Feed Store was not motivated by sincere doubt that the union represented its employees. The union rejected the proposals for a consent election. Under these circumstances, the company is not guilty of an unfair labor practice for refusal to bargain. *Johnson dba Roanoke Public Warehouse*, 1947, 72 NLRB 1281.

Where there is no duty to bargain, a refusal to bargain does not constitute an unfair labor practice and unilateral wage increases do not constitute an unfair labor practice. An employer is not prohibited from announcing or granting economic benefits during a union's organizational campaign or even during the pendency of

a Board ordered election. *Hudson Hosiery Co.*, 72 NLRB 1434. The actions of the union and the employer subsequent to the hearing are not in question, at this time, but as a matter of fact, the employer and the union did conduct negotiations subsequent to the hearing, as a result of the finding of the Board that the union represented a majority of the employees (Tr. 14). If the employer were found guilty of an unfair labor practice for refusal to bargain in this case, it would mean that whenever a union demanded recognition and demanded to bargain that a duty immediately arose for the employer to bargain even though he had a reasonable doubt as to the majority status of the union and even though he, in good faith, attempted to resolve that doubt by agreeing to enter into a consent election, which the union spurned and refused to enter into. Monroe Feed Store filed a petition for a representation election with the NLRB (Tr. 7-9) (Tr. 85- 86).

SPECIFICATION OF ERROR IV

The NLRB erred in rejecting as incompetent the affidavit of David O. Crockett, deceased, taken by Field Examiner of the NLRB prior to the hearing upon the complaint. Omitting the formal parts, this affidavit reads as follows:

“I, David O. Crockett, a person of law age, being first duly sworn, make the following statement voluntarily and of my own free will:

“I live at 1393 Franklin Street, Salem, Oregon. My telephone number is 2-6000. I am the manager of the Corvallis store of the Monroe Feed Store.

"On or about Wednesday, October 28, 1953 I went over to the Southern Pacific Depot to get some cars turned loose and one of the fellows there whose first name is Bill, who clerks there asked me what happened at the Union meeting the night before at Belfountain. I didn't want to admit to him that I didn't know what was going on so I just turned it off. When I came back to the office Webster Sams and H. G. Gann were eating lunch in the display room. I asked Webster then if he had attended a union meeting down in Belfountain. He said, 'In order to have a union meeting, you have to have a meeting in a union hall don't you?'

"I said: 'No, I don't think so. I've attended a lot of union meetings that were never held in a hall.'

"After he had finished his lunch about 10 minutes later he came up to me and said that that meeting was in his house in Belfountain and that it was just a get together among a few of the boys, and that there was no union men there at all.

"I remarked then that it didn't make any difference to me but that I thought that it was peculiar to be told about it by somebody over at the freight office. I also made the remark that it was odd that they would know more about things going on around here than I did. Webster agreed with me that it was odd because he knew nobody over at the Southern Pacific freight office. That was the end of our conversation.

"About the middle of the week after the men were laid off on Friday Webster Sams was in to see me about his check and he again volunteered the statement that there was no union official at the meeting at his house. I told him 'It doesn't make any difference anyway Web, you'll have to pick your check up down at Monroe because I have no authority to keep your check here.'

"Mr. Geisy called me down to Monroe on October 30, 1953 and I had a conference with him that

day. That was when he told me that he had been notified by the auditors that he had lost money and told me that we would have to lay the men off at the end of the day. The checks for the men were made out while I was down there and I brought them back with me. I believe that it was on the afternoon of Wednesday, October 28, 1953 that I talked to Mr. Geisy on the phone about the meeting at Belfountain, and told him the same thing that I have mentioned above. I think I told him that I was put out about picking up information that was going around the place that I didn't know anything about. I did not at any time tell Webster Sams that he should watch out that he didn't do anything under cover nor did I tell him that you have to advertise a union meeting thirty days in advance.

"When I told Geisy about the meeting and that Webster Sams told me that it wasn't union meeting and that I didn't like it Geisy told me to forget about it or pay no attention to it, if Webster Sams said that it wasn't a union meeting it probably wasn't. He said that the men had talked union before.

"On Monday or Tuesday, November 2 or 3, 1953, I found an old shirt soaked with diesel oil laying on the ground under the edge of the dock. I found it sometime in the middle of the morning.

"I have read the above statement consisting of one typewritten page in addition to this page.

/S/ DAVID O. CROCKETT

"Subscribed and sworn to before me this 20th day of November, 1953, at Corvallis, Oregon.

/S/ ARTHUR J. HEDGES,

Field Examiner, National Labor Relations Board, 36th Sub-Region." (Tr. 199-201)

ARGUMENT

David O. Crockett was assistant manager of Monroe Feed Store in charge of the Corvallis operation (Tr. 93). Monroe Feed Store consists of a location at Monroe and a location at Corvallis (Tr. 57). Mr. Crockett laid off the employees at the Corvallis plant and had supervision over rehiring employees (Tr. 109, 110). The General Counsel of the NLRB relies upon the activities of Crockett and conversations between Geisy and Crockett as the basis for the findings of interference, restraint and coercion (Brief of NLRB, pp. 3, 4). At the time of the hearing, Mr. Crockett was deceased (Tr. 196, 202). Prior to his demise and prior to the hearing, David O. Crockett executed an affidavit before Arthur J. Hedges, Field Examiner for the NLRB. This affidavit was executed on November 20, 1953, at Corvallis, and is set forth in the transcript on pages 199, 200 and 201. Upon stipulation, Monroe Feed Store offered a true and correct copy of this affidavit in evidence inasmuch as the General Counsel, upon demand, refused to produce the original affidavit which was in the file of the General Counsel of the NLRB (Tr. 196, 197, 198). The Trial Examiner ruled that this document was incompetent and was rejected. Considering the fact that the General Counsel relied upon testimony of one, Harrington, that Turner told Harrington that Turner overheard a conversation between Crockett and Geisy, it would appear that the affidavit of Crockett himself would be competent evidence (Brief of NLRB, p. 4).

Oregon statutes provide (ORS 41.880): "... and when a detached . . . conversation . . . is given in evidence, any

other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence." This affidavit explains the conversation between Crockett and Geisy and also explains the conversation between Crockett and Webster Sams concerning whether or not the union was involved in the meeting at Bel-fountain as far as Mr. Sams' statement was concerned. The Trial Examiner should have admitted this affidavit. *Local No. 3, United Packinghouse Workers CIO v. NLRB* (CA 8, 1954), 210 Fed 2d 325.

SPECIFICATION OF ERROR V

The Board erred in denying the motion of respondent for an order reopening the hearing for receipt of further testimony.

ARGUMENT

Monroe Feed Store filed a motion with the NLRB requesting an order reopening the hearing for the receipt of further testimony. This motion was denied and Monroe Feed Store filed a motion with this court for leave to adduce additional evidence. The evidence that Monroe Feed Store seeks to make a part of the record is found in the affidavit in support of the motion for leave to adduce additional evidence. The argument is found in the brief in support for the motion for leave to adduce additional evidence filed by Monroe Feed Store in support of this motion.

SPECIFICATION OF ERROR VI

The Board erred in ordering that respondent offer to all its employees who were discharged on October 30, 1953, immediate and full reinstatement, and that respondent make all such employees whole for any loss of earnings.

ARGUMENT

The complaint in this case alleges a violation of Section 8(a)(1) and Section 8(a)(5) of the Act. It does not allege a violation of Section 8(a)(3) of the Act (Tr. 1-6). This Court must determine whether the Board acting within its power has ordered the appropriate remedy. *NLRB v. Parker's Prairie Cooperative Creamery Association*, CA 8, 1946, 154 Fed 2d 453. Back pay provisions of a Board order have been denied enforcement on the ground that the evidence was insufficient to show discriminatory discharges where the reinstatement provisions of the Board's order have been enforced on the ground that such order was supported by evidence showing anti-union conduct. *NLRB v. Waples-Platter Co.*, CA 5, 1944, 140 Fed 2d 228. See also *Consolidated Aircraft Corp. v. NLRB*, CA 9, 1944, 141 Fed 2d 785; *Richfield Oil Corp. v. NLRB*, CA 9, 1944, 143 Fed 2d 860. Monroe Feed Store submits that the evidence of discrimination is not substantial and is insufficient to base an award for back pay. It is not in the public interest to award back pay where the evidence of discrimination is speculative and good cause exists in the form of a loss of \$30,000 for discharging

employees. One employee, Ray Joyner, challenged the employer to a fight and had a heated discussion with him (Tr. 169). In addition to challenging his employer to fight, this employee used obscene language towards his employer and told his employer that he was tired of being pushed around by "you big bastards" and stated that "he did not have to kiss anyone's ass for employment." The employer could not hire him back under any consideration, considering his attitude (Tr. 213, 214). An order of reinstatement regarding an employee with this attitude and taking these actions would not be reasonably designed to effectuate the policy of the NLRA. This would lead only to more strife and unrest.

CONCLUSION

It is respectfully submitted by Monroe Feed Store that the order of the Board should be set aside in whole or in part. In the event the Court finds that the Order of the Board should not be set aside in whole or in part, it is respectfully submitted that the case should be remanded to the Board for the receipt of further testimony.

Respectfully submitted,

MASTERS & MASTERS,
By WILLIAM J. MASTERS,
Attorneys, Monroe Feed Store.



No. 15048.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST SILVA TUCKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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FILED

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PAUL P. O'BRIEN, CLERK



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No. 15048.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST SILVA TUCKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

JURISDICTIONAL STATEMENT.

The appellant, Forrest Silva Tucker, was convicted by a jury on July 23, 1953, on a one-count indictment returned by the Grand Jury for the Southern District of California, which charged a violation of Title 18, United States Code, Section 2113(d), robbery of a national bank with the use of a dangerous weapon. On August 3, 1953, appellant was sentenced [Tr. 9]¹ to the custody of the Attorney General for five years, to commence upon the expiration of a 25 year term imposed in the Northern District of California on May 20, 1953 on a conviction under Section 2113 of Title 18, United States

¹"Tr." refers to Transcript of Record.

Code, for another national bank robbery in that district [Tr. 29]. The latter conviction having been affirmed on appeal by this Honorable Court in *Tucker v. United States*, 213 F. 2d 784, appellant has been and now is confined at Alcatraz, California, on said sentence and has not commenced serving the five year term imposed in the Southern District of California.

On or about October 28, 1954, appellant filed a "Motion in the Nature of a Writ of Error Coram Nobis" in the United States District Court for the Southern District of California [Tr. 30]. An opposition to the motion was filed by the Government on December 14, 1954 [Tr. 46] and subsequently, on or about January 3, 1955, appellant filed a reply thereto [Tr. 59]. On November 10, 1955, the District Court filed an order denying the motion [Tr. 55]. It appears under the authority of *United States v. Morgan*, 346 U. S. 502, that the United States District Court has jurisdiction to consider a motion in the nature of a writ of error *coram nobis*.

A notice of appeal was filed in this Court on December 12, 1955 [Tr. 58] and appears to have been timely filed under the authority of *United States v. Hayman*, 342 U. S. 205, 209, *United States v. Scarlata*, 214 F. 2d 807, and *United States v. Morgan*, 346 U. S. 502, 506. Thereafter a designation of record [Tr. 56] and statement of points [Tr. 57] were filed by appellant in the District Court. A supplemental designation was also filed by the United States [Tr. 61]. Identical designations and a statement of points were also filed in this Court and the matter is to be heard on the original Transcript of Record without copies thereof being made.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II.

STATEMENT OF THE CASE.

This Court's indulgence is requested with respect to the portions of the record referred to herein. Since appellee does not have a copy of the Transcript of Record and is, therefore, unable to set forth the exact pages thereof, references will be made to the beginning pages shown on the "Transcript of Record" attached to the District Court clerk's certificate, executed on February 14, 1955. Such references will be made on the assumption that the pages of the Transcript of Record before this Honorable Court will be the same as on the above documents. Further indications of pages will be made from the copies of pleadings in the record which are now in the Government's possession.

At the time of the above trial, appellant and co-defendant Richard Bernard Bellew were both represented by court appointed counsel, Richard L. Sullivan for defendant Bellew and Vincent Erickson and Hugh R. Gallagher for appellant. Both defendants were convicted by a jury, Bellew receiving a 15 year sentence and the appellant, five years.

As set forth above, the defendant Tucker had already been sentenced by the District Court in the Northern District of California for a term of 25 years on a similar charge which he is now serving in Alcatraz. It will also be seen from his "Motion for Modification of Sentence" filed in the District Court for the Southern District of California on May 27, 1954 that the appellant is under the following sentences alleged by him to be consecutive to each other:

"25 (*twenty-five*) years imposed May 20, 1953
United States District Court, in San Francisco.

"5 (*five*) years imposed August 3, 1953 by this Court.

"*Six-five years to life consecutive* sentences imposed by the Superior Court of the State of California, County of Alameda to start after the Federal sentences which total 30 years have been served.

"5 (*five*) years in the State of Florida to be served after the California sentence is completed." [Tr. 14; p. 2, lines 15-21 of motion for modification.]

After the above motion for modification was denied by Judge David Ling, who had presided at the trial [Tr. 29], appellant filed a Motion to Vacate the Sentence on July 6, 1954, under Section 2255 of Title 28. This motion was also denied by Judge Ling [Tr. 39] on the authority of *Oughten v. United States*, 215 F. 2d 578. As stated in the opening brief, even if the motion had been sustained he would not have been eligible for release and under the *Oughten* case the proceeding was premature.

Subsequently, on or about October 28, 1954, appellant filed the Motion in the Nature of a Writ of Error *Coram Nobis* on practically the identical grounds set forth in his Motion to Vacate. It was denied by Judge Ling without a hearing by order dated November 10, 1955 [Tr. 55].

III. ARGUMENT.

The motion in the nature of a writ of *coram nobis* was filed in the District Court below upon the following grounds which are set forth in substance:

- (1) Counsel for appellant had a conflict of interest at the time of trial in that (a) he acted in concert with the attorney for the co-defendant Bellew and (b) he had previously acted as attorney in a civil matter for the government's witness John Hancock without revealing this fact to the appellant or court.
- (2) Misconduct of the Assistant United States Attorney who tried the case in that through threats and promises he coerced appellant into an agreement which deprived him of a fair and impartial trial.
- (3) That appellant's attorney, Hugh Gallagher, was "hostile" to the appellant and "failed to safeguard the petitioner's right to a fair and impartial trial."
- (4) Two United States Deputy Marshals were present in the grand jury room at the time of the hearing of evidence and deliberation on the indictment involved which resulted in the indictment being "tainted."
- (5) That the appellant was innocent of the charges contained in the indictment.

As stated above, the motion was denied without a hearing by Judge Ling who had presided at the trial of the criminal case. The Government had filed an opposition to the motion together with affidavits from the persons concerned in the factual allegations made by appellant.

(a) Issues.

It appears that the record on appeal from the order of denial of the Motion in the Nature of a Writ of Error Coram Nobis raises the following issues:

- (1) Whether or not the District Court is required to conduct a hearing on the motion;
 - (2) If so, whether or not this Honorable Court may make a determination on appeal from the present record as to whether or not appellant's presence at such hearing would be necessary;
 - (3) Whether or not the case should be remanded for a certification from the District Court that the files and records of the case conclusively show that the appellant was entitled to no relief;
 - (4) Whether or not the case should be remanded for formal findings of fact and conclusions of law in connection with the order denying the motion.
- (b) **Did the District Court Properly Deny the Motion in the Nature of a Writ of Error Coram Nobis Without a Hearing?**

The Supreme Court of the United States in case of *United States v. Morgan*, 346 U. S. 502 decided January 4, 1954, termed the writ of error *coram nobis* an "extraordinary" remedy. It is apparent that a hearing is necessary upon application for this extraordinary writ under certain conditions.

In *United States v. Hayman*, 342 U. S. 205, decided January 7, 1952, the Supreme Court held at page 220:

"We conclude that the district court did not proceed in conformity with section 2255 when it made

findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present."

At page 222 of the *Hayman* opinion, footnote 36, the Court stated:

"Further, it by no means follows that an issue of fact could be determined in a *coram nobis* proceeding without the presence of the prisoner, the New York Court of Appeals recently holding that his presence was required under the common law. . . ."

The express language of Section 2255, Title 28, U. S. C., provides that the court may determine such a motion without requiring the production of the prisoner at the hearing and the Supreme Court stated that under that section he would not be automatically produced in every such proceeding. It is clear that the same principle applies when the matter is brought before the Court by a motion in the nature of a writ of error *coram nobis* rather than under Section 2255.

Although a hearing is necessary in certain instances, the Government respectfully submits that the within matter does not fall in that category of cases.

It is fundamental that a judgment carries with it the presumption of regularity and is not lightly to be set aside. The burden is on the accused to show that it is not correct.

United States v. Morgan, 346 U. S. 502, *supra*;

Haywood v. United States, 127 Fed. Supp. 485
(Dec. 29, 1954).

Since we are dealing here with an "extraordinary" remedy and also with a judgment which is presumed to

be regular, it is submitted that the appellant had the burden on his motion before the District Court of strict compliance with the conditions set forth by the following authorities.

First, the errors of fact which are alleged to have occurred must be set forth in detail.

In the case of *United States v. Pisciotta*, 199 F. 2d 603 (7th Cir.), decided November 3, 1952, the Court of Appeals in discussing the insufficiency of the moving papers stated that the appellant should have alleged certain circumstances in detail. The Court went on to say that since it would result merely in delay to affirm the order because of the insufficiency of the moving papers it would be consequently remanded in order that the appellant would have the opportunity of filing a supplemental affidavit to cure, if he could, the defects of his pleadings.

Although that case was concerned primarily with whether or not the prisoner should have been produced for a hearing, it is submitted that in order to invoke a hearing at all the facts should be fully alleged.

In *United States v. Sturm*, 180 F. 2d 413 (7th Cir.), it was held that an application for a writ of error *coram nobis* must contain allegations of the facts in detail as distinguished from mere conclusions. It was further stated that insufficiency of the pleadings can require a denial of the application.

The Court of Appeals for the Seventh Circuit on February 27, 1948 stated in *United States v. Moore*:

“As a corollary, it is not sufficient to aver merely, in general terms, that the defendant has a good and meritorious defense but the nature of that defense,

the facts constituting it, must be set forth in such detail as to enable the court to determine whether it is meritorious and sufficient.”

The Court in the *Moore* case, *supra*, went on to say that the above rule applies irrespective of how the judgment is attacked and applies in applications for writs of *coram nobis*. This followed from the historical fact that the writ at common law was used to bring before a court a judgment rendered by it for the purpose of review because of an error in fact affecting the regularity of the proceedings. The Court then quoted with approval from *Shipley v. State*, 210 Ind. 253, 2 N. E. 2d 389, to the effect that before the writ would be granted it must be clearly apparent that a valid defense exists in the facts of the case for the petitioner.

In *Adams v. United States*, 222 F. 2d 45, the Court of Appeals for the District of Columbia discussed the appellant's allegations as to an absent witness at the time of trial. Apparently he had not set forth what the substance of the testimony of this witness would have been, asserting merely that it would have established innocence. The Court said that on the face of the record his allegations would not sustain his claim that he was not given a fair trial and that his sentence should be set aside.

The Court in the *Adams* case went on to quote with approval from *Diggs v. Welch*, 148 F. 2d 667, in which it was stated that in order for a claim under Section 2255 to succeed an “extreme case” must be disclosed. It must be *shown* that the proceedings were a farce and a mockery of justice. . . . (Emphasis added.)

It is submitted that an extreme case must be disclosed not only at the time of the hearing, but on the face of the pleadings themselves.

In the case of *United States v. Newman*, 126 Fed. Supp. 94 at page 97, the Court stated that in determining whether substantial issues are raised the Court must determine whether the facts alleged have or do not have any merit.

“Where the allegations are *patently unbelievable* from a study of the motions, files and records of the case, the court in the exercise of sound judicial discretion should deny relief, otherwise the court would be required on bare allegations to transfer prisoners at their whim.” (Emphasis added.)

Also in *Johnson v. United States*, 163 F. 2d 827 (5th Cir.), the Court stated briefly:

“An examination of the contents of the petition in the *light of the record* discloses no ground for the granting of the *extraordinary writ* he wishes and the petition is denied.” (Emphasis added.)

It must be kept in mind in the within case that Judge Ling who denied the Motion in the Nature of a Writ of Error Coram Nobis presided over the trial of the criminal case. There is no indication that he did not have access to the reporter's notes of the proceedings and, of course, he was able to review the record which is before this Honorable Court. In addition, Judge Ling had the benefit of his knowledge of the trial proceedings, a transcript of which is not before this Honorable Court. It will be shown by a review of this point raised in the motion before him that the allegations in the pleadings alone were

patently unbelievable or that the bare allegations were completely insufficient to warrant a hearing.

In *Morales v. United States*, 187 F. 2d 518, the Court of Appeals for the First Circuit on March 14, 1951 reviewed a denial of a motion under Section 2255. At page 519 the Court stated:

"It is apparent that the district court decided the appellant's motion on its face in the light of the files and records of the case, and on that basis determined that it conclusively appeared that the petitioner was entitled to no relief. There was, therefore, no statutory requirement for making findings of fact and conclusions of law, for summary disposition of futile motions is permitted under the third paragraph of section 2255. . . ." (Emphasis added.)

It is respectfully submitted that this Court will be able to state from a review of the record that it is likewise apparent the Court decided the motion below in a similar manner and that the denial of the motion without a hearing was completely warranted.

1. Alleged Conflict of Interest of Attorney for Appellant.

In his Motion in the Nature of a Writ of Error Coram Nobis appellant alleged that Mr. Gallagher had represented the government's principal witness in a civil matter *prior to the time of the criminal trial*. It was further stated that appellant had not been advised of Mr. Gallagher's "connection" with said witness. It was also alleged that at appellant's insistence counsel finally agreed to visit the bank where the witness was employed but that the effort was not "fruitful." As a result of this situation it was alleged that Mr. Gallagher gave his allegiance to the witness, did not act in good faith and that his ques-

tioning of the latter was a “farce and a mockery,” being a show “put on for the benefit of the Court and the petitioner.”

In connection with the alleged conflict of interests appellant stated that Mr. Gallagher advised him that no defense was needed for petitioner and that he had agreed with counsel for the co-defendant to conduct the defense of the petitioner “with due regard to the defense of Mr. Sullivan’s client.” It was said at page 4 of appellant’s motion “Throughout the entire trial Mr. Gallagher’s attitude was that the petitioner would automatically be acquitted and even if he were convicted the Government would not impose an additional sentence. His theory of a defense was to aid the defense of the co-defendant.”

As stated in appellant’s motion this contention was related to his Point Three on page 8 of said motion [Tr. 30]. Rather than making a separate subtitle for the latter it will be discussed herein. Appellant claimed that Mr. Gallagher was “hostile” to the petitioner and failed to safeguard his right to a fair trial. It was alleged that his attorney “expressed his disfavor” at the appointment, that he was being “forced” to represent him by the Court, that throughout the trial when petitioner demanded certain objections be made, Mr. Gallagher told him to “sit tight” and that since part of his living was made in federal courts he did not want to jeopardize his position in a case for which he was not being paid.

In support of his allegation that a conflict of interest existed because of counsel’s alleged prior representation of the Government witness in a civil action, appellant cited the case of *United States v. Hayman*, 342 U. S. 205. There, the defendant had received a 20-year sen-

tence on a Federal charge and filed a motion under Section 2255 alleging that he had not had effective assistance of counsel. The claim in that case was made that a principal witness against him at his trial, who was a defendant in a related case, was represented by the same lawyer who conducted his defense. The Court held that “since a conflict of interests of his attorney might have prejudiced respondent *under these circumstances* * * *” (emphasis added) a hearing was warranted.

It is submitted that the situation in the *Hayman* case was entirely different from the circumstances which were alleged herein. If appellant’s attorney had represented a Government witness in a prior civil proceeding *before the trial*, it would not *per se* create a conflict of interests in the subsequent action or even a question of conflict which would warrant a hearing. In the *Hayman* matter the attorney in effect was representing two different defendants in practically the same criminal proceeding. It is obvious that such a claim could raise issues which would entitle the defendant to a hearing under Section 2255 or *coram nobis*. Not only is the bare fact of *prior* representation in a *civil* proceeding insufficient to warrant a hearing on the matter but there is no further allegation of any details which would change that situation. Appellant in effect baldly alleged that his counsel had given his alliance to the witness and did not act in good faith. The allegation that the questioning of him by counsel was a “farce and a mockery” is not sufficient to raise an issue under the present proceeding without further detail.

The Court of Appeals for the Eighth Circuit in *Ray v. United States*, 197 F. 2d 268, discussed the record which was before it on appeal. Apparently the record of the

proceedings and testimony at the trial was filed with the District Court but no transcript was furnished to the Appellate Court. It was said:

“The trial judge was best able to say whether the record made at the trial disclosed any grave lack of preparation or of effective representation on the part of the defendant’s counsel and whether the Government secured a conviction based upon the testimony of a witness who was clearly incompetent to testify.

“Upon the record furnished us, we would not be justified in ruling that the District Court was required to grant the defendant a hearing and to make Findings of Fact or Conclusions of Law. * * *”

No record of the proceedings had at the time of trial is before this Honorable Court and it is felt that the assumption can be made on appeal that Judge Ling was best able at the time the above motion was made to determine whether the representations with respect to counsel were true. This is particularly appropriate since most of the allegations made under these two points concern happenings at the time of trial.

In the case of *Adams v. United States*, 222 F. 2d 45, *supra*, the transcript of the trial proceedings was before the Appellate Court so that an examination could be made to determine if the appellant was competently defended. In the absence of such a transcript and the lack of detail in appellant’s allegations there appears to be no justification for the conclusion that a hearing should have been ordered on that point.

In the case of *United States v. Malfetti*, a matter was brought before the District Court on a “Petition for Writ of Error Coram Nobis” but it was treated as an

application under Section 2255. The allegations of the petition assailed the competence of defense counsel, particularly his trial strategy. “The defendant complains that the disclosure of his criminal record early in the trial was a blunder in strategy and prejudicial to his defense * * *. The defendant complains further that he was reluctant to testify on his own behalf and that he was persuaded to do so by his defense counsel.” The trial court held at page 29 of the opinion as follows:

“We are of the opinion that the allegations of the petition, considered in the light most favorable to the defendant, will not support the grounds upon which the motion is based. Assuming, but not deciding that the defense counsel was guilty of the several errors of judgment with which he is here charged, these errors in judgment were not such as to entitle the defendant to a new trial. It is well settled that ‘error in judgment, incompetency or *mismanagement* of the defense by counsel is generally not ground for a new trial.’ *Burton v. United States*, * * * 151 F. 2d 17, 18, * * *.” (Emphasis added.)

If this were a case where the appellant’s extreme youth at the time of trial or on a guilty plea and lack of counsel were in issue, it would appear that a hearing would be warranted. However in this case the allegations as made would not support a requirement for a hearing and there are no details set forth to show that his representation was a “farce and mockery.”

Thus, by way of recapitulation, it is respectfully submitted that a hearing was not warranted on the above contentions made by the appellant because of the authorities which have been set forth herein, the insufficiencies of the pleadings and the lack of a transcript of the record.

2. Alleged Misconduct by Assistant United States Attorney.

As will be noted on pages 5, 6, 7 and 8, appellant alleges that Mr. Manuel Real, formerly an Assistant United States Attorney in the Southern District of California, was guilty of misconduct in that through "threats and promises" he coerced the petitioner into not calling certain witnesses for his defense.

An alleged verbatim report of his conversation with Mr. Real in the United States Marshal's office on or about July 21, 1953, is set forth in the petition. It involved in substance certain witnesses who were to be called to prove that the defendant was in Bakersfield, California, on the day of the robbery. Mr. Real allegedly requested him not to call all of said witnesses since it would hurt the Government's case against co-defendant Bellew. An alleged promise was made to the appellant that the Government would recommend a concurrent sentence if a conviction were secured or perhaps the Government might even agree to an acquittal for appellant at the end of the Government's case.

Appellant alleges at page 8 of his brief [Tr. 30] "the petitioner kept his part of the bargain, he did not request the six witnesses who could testify that it would be impossible for the petitioner to be in Los Angeles on the day of the robbery * * *."

In *Pike v. State*, 139 So. 196, 103 Fla. 594, the Court held that when a writ is sought on the ground of the prosecuting attorney's suppression of evidence, the question would be whether his conduct was characterized by such dominating fraud as to affect the judgment.

However, it does not appear that this court need consider such a question.

In *United States v. Newman*, 126 Fed. Supp. 94, *supra*, the Court stated at page 97:

“There is involved in this motion grave allegations of improprieties on the part of an Assistant United States Attorney, also on the part of a highly respected member of the bar since deceased. Standing by themselves, the charges would be sufficient to require a hearing into their truthfulness. *However, there are other circumstances appearing on the record.*” (Emphasis added.)

In the above *Newman* case the Court continued to discuss certain unequivocal contentions of innocence which were somewhat contradicted in a letter filed in the Court of Appeals and also the fact that the charges against Government counsel came “late in the day.” Apparently the Court felt that it was “singular” that a defendant who had previously alleged in detail as to incompetence, inefficiency, negligence and unfaithfulness of his counsel, should have failed to allege in detail the misconduct of the district attorney. The Court went on “this is therefore not a case where the allegations are meritorious on their face on a view of the entire record and files, . . . The Court concludes that *the defendant is unworthy of belief*, that no purpose would be served in bringing him before the Court to give oral testimony. The Court also finds on a study of the record that defendant raises no substantial issue as to the events alleged to have occurred, and that on the motions files and records defendant is entitled to no relief.” (Emphasis added.)

Assuming that normally the allegations with respect to Mr. Real were charges sufficient to require a hearing into their truthfulness, there are, however, other circum-

stances in the record before this court which show that a hearing was not in fact required.

On the 22nd day of July, 1953, while the trial of the criminal case was still in progress an "Affidavit of Indigent Defendant Richard Bernard Bellew" was prepared for the signature of said defendant [Tr. 6]. It contained a list of seven names of witnesses without whose presence it was said the defendant could not safely go to trial. Although appellee does not have access to the original affidavit at this time, and the copy in its possession is not conformed, it will be noted that the original contains handwritten inserts of the appellant Tucker's name so that when it was filed the document was a joint affidavit of both defendants. The presence of these witnesses was requested by the defendants as eye witnesses of the events which occurred at the time of the robbery in connection with their identification as perpetrators of the crime.

In appellant's Motion in the Nature of a Writ of Error Coram Nobis below it was alleged on page 9 thereof as follows:

"The co-defendant prepared a motion that certain witnesses be called to testify for the defense. The petitioner requested Mr. Gallagher to make a like motion but he was told those were Bellew's witnesses and he didn't want to infringe on Mr. Sullivan's case. It was necessary for the petitioner to go to Mr. Sullivan and *demand* that his name be added to the motion. Mr. Gallagher protested but Mr. Sullivan added the petitioner's name to the motion in ink. This motion was subsequently denied." (Emphasis added.)

The filing of the above affidavit and the allegations set forth in the motion with respect thereto are at considerable

variance with the appellant's contentions on Points Two, pages 5, 6, 7 and 8 of his motion [Tr. 30], with respect to alleged misconduct by the Assistant United States Attorney.

As stated above, appellant's claim was that Mr. Real asked him not to call certain witnesses for his defense "who might compromise the government's case against the co-defendant, Bellew, . . ." Those witnesses were allegedly to be used to prove that the appellant was in Bakersfield, California, the day of the robbery. It was then alleged at page 8 that the petitioner had kept his part of the bargain not requesting the witnesses who would testify to that effect. This does not sound like the same defendant who was on practically the same day insisting to his counsel that his name be added to an affidavit which requested the presence of witnesses who would surely "compromise" the government's case by indicating that the defendants could not be identified as the perpetrators of the crime. By his own statements, appellant admitted that he went to Mr. Sullivan, counsel for Bellew, and *demand*ed that his name be added to the motion. Why would he insist upon this if under his alleged agreement with Mr. Real where he was expecting a favorable recommendation for a concurrent sentence or an agreement to an acquittal for him at the end of the government's case, he was not supposed to call witnesses who would hurt the government's case against Bellew.

The Government respectfully submits that on the face of the motion itself his allegations with respect to Mr. Real are "patently unbelievable."

Further light on this point is shed by another pleading in the record on appeal.

This case proceeded to trial before a jury on the 20th day of July, 1953, the Honorable Dave W. Ling presiding. It continued to July 23, 1953, when the jury retired for its deliberation. When the trial was well on its way to a conclusion the defendant Tucker submitted the following instruction [Tr. 2]:

“When one who is not at the place where a crime was committed at the time of its commission is later charged with having been present and having committed or taken part in committing such crime, his absence from the scene of the crime, if proved, is a complete defense that we call an alibi.

“The defendant, FORREST SILVA TUCKER, in this case *has introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offense*, for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not the defendant was present at the time the crime was committed, he is entitled to an acquittal.” (Emphasis added.)

Although the defendant assured the trial court in his motion that *he had kept his part of the “bargain”* the Assistant United States Attorney did not follow through with his alleged promises. However, appellant’s own instruction shows that he introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offense for which he was on trial. This cannot be reconciled with his statement that he was willing not to call witnesses who would prove that he was not in Los Angeles on the day of the robbery. Therefore, again on the very face of the record before this Court it appears that the petitioner’s allegations with respect to Mr. Real are unbelievable.

3. Alleged Presence of Two Deputy Marshals During Deliberation and Voting of Grand Jury.

Again, the defendant has not set forth in any detail the facts surrounding the alleged presence of the above individuals in the grand jury during voting and deliberation on the within indictment. If the defendant actually had heard of such an occurrence and was not able to obtain such information as the names of the deputies, etc., then it is submitted that the source of his information or any other pertinent facts should be set forth in full in the motion. Then, if the point were appropriate on the motion, the district court would have had an opportunity to determine if a hearing were warranted.

However, it appears that under Rule 12(b)(2) of the Federal Rules of Criminal Procedure such an objection is waived unless raised in the manner set forth therein. It reads in part as follows:

“Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the Court or to charge an offense may be raised only by motion *before* trial.

“Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver * * *.” (Emphasis added.)

The record does not show that any objection before trial was made on this point by the appellant. Further, no cause was shown to the District Court so that relief could be granted from a waiver. It also appears that this objection might then be proper on appeal, but not appropriate to a motion in the nature of a writ of error *coram nobis*.

(c) If the Hearing Is Required, Should the Appellate Court Make a Determination at This Time as to Whether or Not Appellant's Presence Would Be Necessary?

The Government has strongly urged in subdivision (b) *supra*, that no hearing was required to support the District Court's denial of the Motion in the Nature of a Writ of Error Coram Nobis.

Assuming, *arguendo*, that this Court holds a hearing was necessary, the prison's production for such a hearing should not be ordered unless there are "substantial issues of fact as to events in which the prisoner participated." In the case of *United States v. Pisciotta, supra*, the Court of Appeals for the Second Circuit at 199 F. 2d 603, stated:

"But in applying this sound precept the question arises how fully must a convict allege the facts upon which he relies in order to establish that the motion raises 'substantial issues of fact'. If it were sufficient to allege merely conclusionary statements, such as, 'I am innocent but was induced to plead guilty against my wishes,' one can readily imagine how many convicts without valid complaint against their sentences would obtain an excursion from a distant penitentiary at Government expense. We think that the motion papers must contain more than conclusionary allegations of innocence and of a miscarriage of justice.

* * * * *

"Consequently we think the cause should be remanded in order that the appellant may file a supplemental affidavit to cure, if he can, the defects of his October 1951 affidavit. The Court will then be in a position to determine whether 'substantial issues of fact' are presented which require the prisoner to be brought on to testify at the hearing."

It is apparent that this case when using the words "the Court" was referring to the District Court below.

Thus, it is submitted that the only action which could or should be taken by this Court in that event would be a remand in order that appellant could cure any possible defects in his pleadings.

However it is felt that this would not be proper procedure since the allegations on the face of the motion itself contradict each other so that his contentions are patently unbelievable. It obviously appears that the "farce and mockery" of his representation consisted of alleged mismanagement of the trial by his counsel which the cases have held is clearly not a ground for a motion of this nature. The last point with respect to the Deputy Marshals in the Grand Jury is again not an appropriate basis for this motion.

(d) Was the District Court Required to Make Findings of Fact and Conclusions of Law and/or a Certification That the Files and Records of the Case Conclusively Showed That the Appellant Was Entitled to No Relief?

Appellant has contended that procedure under *coram nobis* is similar to that under Section 2255 of Title 28, United States Code. The third paragraph of that section provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall * * * determine the issues and make findings of fact and conclusions of law with respect thereto." Thus, it is apparent that the Court does not have to make findings of fact and conclusions of law when the record shows conclusively that the petitioner is not entitled to relief. It is believed that it has been demonstrated that the motion and the files and records of this

case do conclusively show that the prisoner is entitled to no relief and therefore, findings of fact and conclusions of law were not necessary.

There is no indication in the *Hayman* and *Morgan* cases that the District Court must so certify and in fact in the case of *Morales v. United States*, *supra*, 187 F. 2d 518 at page 519, the Court of Appeals for the First Circuit stated, "*It is apparent* that the District Court decided the appellant's motion on its face in the light of the files and records of the case, and on that basis determined that it conclusively appeared that the prisoner was entitled to no relief." This definitely indicates that the Court of Appeals may scrutinize the entire record to determine on what the District Court did base its decision that the petitioner was conclusively not entitled to relief on the files and records of the case. Indirectly, it tells us that no certification to that effect is necessary. It is sufficient if it appears that such was the case.

IV. CONCLUSION.

It is respectfully submitted that the order of the District Court denying appellant's motion in the nature of a writ of error *coram nobis* should be affirmed by this Honorable Court.

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